

1	C O N T E N T S	
2	ORAL ARGUMENT OF	PAGE
3	GEN. PAUL D. CLEMENT, ESQ.	
4	On behalf of the Petitioner	3
5	ORAL ARGUMENT OF	
6	PRISCILLA SMITH, ESQ.	
7	On behalf of the Respondent	28
8	REBUTTAL ARGUMENT OF	
9	GEN. PAUL D. CLEMENT, ESQ.	
10	On behalf of the Petitioner	53
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		

1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 first this morning in case 05-380, Gonzales vs. Carhart.
5 General Clement.

6 ORAL ARGUMENT OF GEN. PAUL D. CLEMENT

7 ON BEHALF OF PETITIONER

8 GENERAL CLEMENT: Mr. Chief Justice, and may
9 it please the Court:

10 Congress held six hearings over four
11 different Congresses and heard from dozens of witnesses
12 in determining that partial-birth abortions are never
13 medically necessary, pose health risks, and should be
14 banned. Under familiar principles of deference to
15 congressional fact-finding, those determinations should
16 be upheld as long as they represent reasonable
17 inferences based on substantial evidence in the
18 congressional record.

19 That standard is amply satisfied here. The
20 evidence before Congress was clear that partial-birth
21 abortions were never medically necessary, and that safe
22 alternatives were always available such that no woman
23 would be prevented from terminating her pregnancy. As a
24 result, Congress was entitled to make a judgment in
25 furthering its legitimate interests that they were going

1 to ban a particularly gruesome procedure that blurred
2 the line between abortion and infanticide.

3 JUSTICE GINSBURG: General Clement, couldn't
4 a similar record be made with respect to what is the
5 more common procedure, the D&E, that involves
6 dismemberment of a fetus inside the womb. So assuming
7 you're right that it is constitutional for Congress to
8 ban the D&X proceeding, wouldn't the same reasoning
9 apply, couldn't Congress make similar findings with
10 respect to what is the most common method for second
11 trimester abortions?

12 GENERAL CLEMENT: I don't think so, Justice
13 Ginsburg, and I think that this Court's precedence, in
14 particular the Danforth case, would stand as an obstacle
15 to that piece of legislation, because in Danforth, this
16 Court struck down an effort to ban what was then the
17 majority method of inducing a second term abortion.

18 And I think in the same way, there is quite
19 a different situation when Congress comes in and tries
20 to deal with the primary abortion method in the second
21 trimester. Here, though, Congress didn't go after the
22 dog, so to speak, it went after the tail. This very
23 aberrant procedure, atypical procedure. And the numbers
24 are hard to come by, but I don't think anybody suggests
25 that the D&X procedure is anything more than a very

1 small minority of second trimester abortions. And so I
2 do think --

3 JUSTICE GINSBURG: Even though we are told
4 by some of the medical briefs that the procedure is
5 basically the same, they start out in the same way and
6 that the difference -- the differences are not large in
7 particular cases.

8 GENERAL CLEMENT: Well, Justice Ginsburg,
9 let me make a couple of points in response to that. I
10 think -- taken at the broader level first, I think there
11 is one very important difference between these two
12 procedures that led Congress to ban one and allow the
13 other to stand. And that is whether fetal demise takes
14 place in utero, which is, of course, the hallmark of all
15 abortions, or whether fetal demise takes place when the
16 fetus is more than halfway out of the mother.

17 Now, as to their suggestion, I think most
18 particularly by Respondents in the second case, that
19 there really is no meaningful difference between those
20 two procedures. And with respect, I just don't think
21 the record supports that. If you look at the record in
22 this case, it's very clear in the district court opinion
23 that you have some doctors, and examples would be
24 Plaintiff's expert, Dr. Creinin, or one of the Nebraska
25 Plaintiffs, Dr. Vibhakar. They go in, in each and every

1 case, and try to perform a dismemberment, or D&E,
2 procedure.

3 And because they're trying to perform the
4 D&E procedure, they need to dilate the cervix only
5 modestly. And so Dr. Creinin, for example, his
6 testimony is he only dilates the cervix two centimeters
7 or two and a half centimeters.

8 Now, in contrast, you have other doctors,
9 and here the examples I would point to are two of the
10 Plaintiff's experts, Dr. Chasen and Dr. Frederickson,
11 they, in every single case, set out to perform the D&X
12 procedure. And that has material differences. For
13 example, the dilation regimen that they use. And so
14 Dr. Frederickson, for example, uses multiple sets of
15 laminaria to dilate the cervix, and she gets a much
16 greater degree of dilation, 5 to 6 centimeters of
17 dilation.

18 And of course, not only do they set out to
19 perform different procedures, but they, in fact, perform
20 different procedures. So the evidence here again
21 reflects that Dr. Vibhakar, for example, in 100 percent
22 of the cases, ends up performing a dismemberment
23 procedure, or a D&E procedure. For Dr. Creinin, it's 99
24 percent.

25 Now, by contrast, Dr. Chasen and

1 Dr. Frederickson, when they set out to perform a D&X
2 procedure, they are successful in their objective less
3 often. There are different numbers for different
4 doctors, but it seems that, at most, they can achieve
5 their objective about a third of the time.

6 JUSTICE KENNEDY: Well, didn't those doctors
7 testified in the congressional hearings or in the Eighth
8 Circuit or Ninth Circuit or the Second Circuit? There
9 are so many doctors here. Which are the two that you're
10 referring to that do not dilate the cervix fully? Did
11 they testify in any of the district court cases?

12 GENERAL CLEMENT: They did, Justice Kennedy,
13 and in particular, Dr. Creinin is an expert. I think
14 his deposition was taken, or his testimony was taken
15 principally in the California case, but it was
16 introduced in all three cases as part of the evidentiary
17 record. Dr. Vibhakar is one of the Plaintiffs in this
18 particular case. And Dr. Chasen and Dr. Frederickson
19 would also -- their testimony was in the record, I
20 think, in all three cases.

21 JUSTICE BREYER: Just from my going through
22 this record, I compare it to Stenberg, with what's in
23 Congress. We have two cases here. And it's a fair
24 conclusion that there are, in each case, before Congress
25 and in here, there are some doctors who think this is

1 safe and some doctors who think it isn't safe.

2 And if you look at the -- sort of by
3 counting, by numbers, I guess if you look by lines of
4 testimony or by different doctors, interestingly enough,
5 it seems to me there are more doctors in these two cases
6 and in front of Congress who said it is not safe than
7 there were when we considered the other case. And there
8 are fewer doctors who say it is safe even with the other
9 case. So I don't know if you're supposed to count
10 doctors or what.

11 My question would be, if this -- do we owe
12 more deference to a congressional finding or to Congress
13 than we owe to a state legislature? What is -- I mean,
14 I take it a state legislature is democratically elected,
15 and don't we owe similar deference to both?

16 GENERAL CLEMENT: Well, Justice Breyer, I
17 think you certainly owe deference to both. I think --

18 JUSTICE BREYER: Well, if we owe deference
19 to both, and I would have thought that we did, then I
20 think in the Nebraska case, despite the deference that
21 was owed, the Court came to the conclusion that the
22 statute of Nebraska was unconstitutional because it
23 lacked an exception for the health of the mother,
24 something that came from preceding cases. So if giving
25 deference to Nebraska, we reach that conclusion there,

1 and if the deference that is owed is the same, and if
2 the evidence is about the same on both sides, how can we
3 reach a different conclusion here?

4 GENERAL CLEMENT: Well, Justice Breyer, I
5 mean, obviously I'm at a certain deficit to you in
6 discussing what this Court held in the Stenberg opinion,
7 which you wrote. But my reading of that opinion is that
8 this Court did not focus on what was before the Nebraska
9 legislature. But this Court focused on what the
10 district court found. And in particular, in the
11 critical part of the opinion, which would be Section
12 2(A) of the opinion, as I read the opinion, what this
13 Court did is it confronted Nebraska's argument that the
14 D&X procedure was not, in fact, safer.

15 And the first thing this Court did is said,
16 well, that argument faces quite a burden, because the
17 district court made a contrary finding. And then this
18 Court in 2(A)(1) of the opinion referenced that finding,
19 and four different times cited the district court
20 record, and then so on and so forth. It then noted the
21 various eight arguments were made by the state in its
22 amici to the contrary. And as I read the opinion, it
23 basically says the latter of the objections don't
24 outweigh the former findings.

25 Now, I think if you compare the record

1 before the courts and before Congress, compare that to
2 what was before the district court in Stenberg, I think
3 there is a much more robust factual record here. If you
4 look at the Stenberg case --

5 JUSTICE STEVENS: General Clement, are not
6 some of the findings by Congress clearly erroneous? For
7 example, there is a statement that no current medical
8 schools provide instruction in the procedure. Now
9 that's clearly wrong, isn't it?

10 GENERAL CLEMENT: Well, I mean, specifically
11 what Congress found in that finding was that none of
12 them provided it as part of a curriculum. And I think
13 what the record here clearly reflects -- you know, I
14 don't know that the idea of a curriculum -- I don't know
15 exactly what Congress had in mind. But clearly, it's a
16 matter of teaching residents --

17 JUSTICE STEVENS: Do you think that finding
18 is correct?

19 GENERAL CLEMENT: I don't know if it's
20 correct, based on the curriculum.

21 JUSTICE STEVENS: Supposing there was a lot
22 of evidence introduced in the district court that there
23 were schools like Yale and New York University that did
24 include this as part of a curriculum, could the district
25 court disregard that finding and make a contrary

1 finding?

2 GENERAL CLEMENT: I think if the evidence in
3 the district court were overwhelmingly to the contrary,
4 I think that the district court could effectively
5 undermine that one finding. I don't think in this case
6 anything turned --

7 JUSTICE STEVENS: Well, on other findings,
8 is there a different standard of review of what the
9 district court found as opposed to what Congress found?

10 GENERAL CLEMENT: Well, Justice Stevens, I
11 may answer you this way. You might first want to
12 isolate those situations where, if the district court
13 was addressing something, an issue that just wasn't
14 before Congress at all, but it's somehow relevant, and
15 makes factual findings, I suppose the district court is
16 entitled to the normal kind of deference on review.

17 But I think if you have situations, which
18 you have in this case, where the district court heard
19 some of the same witnesses who testified before Congress
20 and before the district court, and the district court
21 makes a different credibility finding than the Congress
22 made, I don't think that's a basis for the district
23 court to be able to overcome the contrary findings of
24 Congress.

25 JUSTICE STEVENS: Well, I don't understand

1 Congress to have made credibility findings. As I read
2 the -- I read the whole finding. There were six or
3 seven pages of findings, and I don't find a single
4 reference in those findings to the performance of an
5 abortion on a nonviable fetus. All of the language in
6 the findings seem to be referring to viable fetuses just
7 inches away from becoming a person. And I don't think
8 you can even find the word fetus in those findings. The
9 findings as opposed to the text of the statute.

10 GENERAL CLEMENT: Sure, Justice Stevens, I
11 think I need to clarify an important point there, which
12 is to say, the statute didn't focus on viable versus
13 nonviable, because it applies to both sides of the
14 viability line.

15 JUSTICE STEVENS: I'm talking about the
16 findings. Is there a single word in the findings that
17 refers to a viable fetus? It maybe refers to a
18 nonviable fetus.

19 GENERAL CLEMENT: I don't think there is,
20 Justice Stevens, but I wouldn't find that at all
21 remarkable in a statute that applies and bans certain
22 procedures without regard to whether the procedure is
23 applied to a viable or non-viable fetus and when
24 Congress does make specific findings that the procedure
25 it's banning would have the effect of preventing a

1 lethal act on a fetus just inches from being born. It's
2 not --

3 JUSTICE STEVENS: May I interrupt?

4 GENERAL CLEMENT: Sure.

5 JUSTICE STEVENS: It's requiring that the
6 lethal act be performed prior to any part of the
7 delivery, because there is no doubt there will be a
8 lethal act. The only issue is when it may be performed.

9 GENERAL CLEMENT: The issue is whether --

10 JUSTICE STEVENS: Yes.

11 GENERAL CLEMENT: Yes. Because the issue is
12 whether it's going to be performed in Ute row --

13 JUSTICE STEVENS: Whether the feet are more
14 than halfway out, and some of these fetuses I understand
15 in the procedure, are only four or five inches long.
16 They are very different from fully formed babies.

17 GENERAL CLEMENT: Justice Stevens, again,
18 you're right.

19 JUSTICE SCALIA: When it's halfway out, I
20 guess you can call it either a child or a fetus.

21 GENERAL CLEMENT: I think you could use
22 either terminology, Justice Scalia. My point is,
23 nothing turns on the terminology. I mean, the
24 terminology that Congress chose to use is a living
25 fetus. I think the point, though, is that when fetal

1 demise is induced in utero, whatever else you think
2 about that procedure that is classically an abortion, as
3 it has been always understood. But when fetal demise is
4 induced when the, when the living fetus is over halfway
5 outside of the womb, then I think Congress --

6 JUSTICE STEVENS: Wouldn't the fetus be -- I
7 think it suffer a demise in seconds anyway.

8 GENERAL CLEMENT: Well it may be seconds, it
9 may be hours; it depends on -- because even a pre --

10 JUSTICE STEVENS: Do you not agree that it
11 has no chance of surviving, in most cases?

12 GENERAL CLEMENT: If we are talking about
13 previability then by definition chances are it won't
14 survive.

15 JUSTICE STEVENS: Yes, that's right.

16 GENERAL CLEMENT: But again, I don't think
17 that, you know, that anything in this act --

18 JUSTICE STEVENS: Congress has made the
19 judgment that it is far preferable to ensure that fetal
20 demise takes place before any delivery begins. That's
21 the big issue.

22 GENERAL CLEMENT: Well, I'm not sure if it's
23 whether, that's a fair, that's a fair summary. I mean,
24 you know, the line isn't that fetal demise has to be
25 done before any delivery begins, but the basic point of

1 this statute is to draw a bright line between a
2 procedure that induces fetal demise in utero and one
3 where the lethal act occurs when the child or the fetus,
4 whichever you want to call it, is more than halfway
5 outside of the mother's womb.

6 JUSTICE SCALIA: Would it, would it be
7 lawful or would it be infanticide to deliver the fetus
8 entirely and just let it expire without any attempt to
9 keep it alive?

10 GENERAL CLEMENT: Well, in the
11 post-viability context it would clearly be, it would
12 clearly be infanticide. I think in the pre-viability
13 context, if you have a complete delivery but the child
14 isn't going to survive, I don't think it would be
15 infanticide to necessarily let the child expire --

16 JUSTICE GINSBURG: Mr. --

17 GENERAL CLEMENT: But I do think by contrast
18 if somebody tried to, with the fetus, you know,
19 perfectly alive and in the hours that it might have to
20 live, if somebody came in and ripped its head open, I
21 think we'd call that murder, and in fact Congress passed
22 another statute --

23 JUSTICE GINSBURG: General Clement, that's
24 not what this case is about, because I think you have
25 recognized, quite appropriately, that we're not talking

1 about whether any fetus will be preserved by this
2 legislation. The only question that you are raising is
3 whether Congress can ban a certain method of performing
4 an abortion. So anything about infanticide, babies, all
5 that, is just beside the point because what this bans is
6 a method of abortion. It doesn't preserve any fetus
7 because you just do it inside the womb instead of
8 outside.

9 GENERAL CLEMENT: Justice Ginsberg, that's
10 right, but I don't think that's to trivialize Congress's
11 interest in maintaining a bright line between abortion
12 and infanticide. And the way I would illustrate it is
13 that line, even if you might think it has a temporal
14 line, in the sense that viability versus previability is
15 relevant, it clearly has a spatial dimension as well and
16 the best illustration of that I think is think about a
17 lawful post-viability abortion. There is a problem with
18 the mother's health, there is a problem with her life so
19 it's a lawful post-viability abortion. I don't think
20 that anybody thinks that the law is or should be
21 indifferent to whether in that case fetal demise takes
22 place in utero or outside the mother's womb. The one is
23 abortion, the other is murder.

24 And I think that just recognizes that even
25 in the post-viability context you have a very important

1 line which is a spatial line, and that line is basically
2 in womb, outside of womb, and what Congress tried to do
3 in this statute is to draw that line and differentiate
4 between one procedure where fetal demise takes place in
5 utero --

6 JUSTICE GINSBURG: But if this case were
7 limited to post-viability abortions it would be a
8 different matter. But isn't it so that the vast
9 majority of these abortions are going to be performed
10 pre-viability?

11 GENERAL CLEMENT: I think that's probably
12 right, Justice Ginsburg, but I think the point I would
13 make is that Congress has an interest in maintaining the
14 spatial line between infanticide and abortion, even with
15 respect to pre-viability fetuses and that's true for at
16 least two reasons.

17 JUSTICE BREYER: If -- I see what you're
18 driving at in terms of the procedure. We are focusing
19 on a universe where the fetus is not going to survive no
20 matter what, right?

21 GENERAL CLEMENT: Right.

22 JUSTICE BREYER: Okay. So we are not
23 talking about anyone being born and living. They are
24 not going to.

25 GENERAL CLEMENT: Well, with the caveat gnat

1 statute does apply both --

2 JUSTICE BREYER: And that's the area of
3 focus.

4 GENERAL CLEMENT: Right.

5 JUSTICE BREYER: Now, Congress has said the
6 doctor, you can achieve that result through method A,
7 but not through method B, and you're saying Congress had
8 good reason for doing that. I take it Congress also
9 agrees that if method B, which they don't want, were to
10 be necessary for the safety or health of the mother, the
11 Constitution would require it being done. I didn't see
12 anything here about Congress disagreeing with that.

13 GENERAL CLEMENT: Oh, I think that's right,
14 Justice Breyer. I think this, Congress --

15 JUSTICE BREYER: All right. If that's
16 right --

17 GENERAL CLEMENT: -- took this Court's
18 Stenberg's decision as a given --

19 JUSTICE BREYER: Right. Fine. Okay. They
20 make a finding that although we don't disagree with
21 that, we don't think it's ever necessary for the health
22 or safety of the mother. That's where we are. Now as I
23 look at the record, I see many, many, many doctors
24 telling Congress and everybody else that it is
25 necessary, and safe. And I see other doctors telling

1 Congress primarily, but in court, too, that it isn't
2 necessary, ever for safety.

3 And so if medical opinion is divided, and
4 I'm not advocating what I'm about to say, I just want to
5 know your reaction. If medical opinion is divided, why
6 wouldn't it be up to this Court or could this Court say
7 this use of this procedure, we enjoin the statute to
8 permit its use but only where appropriate medical
9 opinion finds it necessary for the safety or health of
10 the mother?

11 Now, if Congress is right, there will be no
12 such case so it's no problem. But if Congress is wrong,
13 then the doctor will be able to perform the procedure
14 and Congress couldn't object to that because the
15 Congress isn't worried about, I mean Congress, then
16 Congress was wrong. They agreed that we had a health or
17 safety exception.

18 GENERAL CLEMENT: With respect, Justice
19 Breyer, here is the problem with that way of approaching
20 the statute. That might be a permissible way of
21 approaching it if what the evidence on the other side
22 was, that well you know there are cause-specific reasons
23 why you need this procedure. There are particular
24 conditions where you need this procedure. But that's
25 not the evidence on the other side. What their doctors

1 say, the doctors who perform this D&X procedure, the
2 Dr. Chasens, the Dr. Fredericksons, what they will tell
3 you is that every single case the D&X procedure is
4 better and safer and they want to do it. And so it
5 doesn't make, I mean Congress can't pass a statute that
6 bans procedure A, and that ban doesn't apply any time a
7 doctor prefers procedure A.

8 JUSTICE BREYER: No. It just wouldn't be a
9 question of the doctor's preference. You would have to
10 refer back to prior cases, and what the prior cases talk
11 about including Stenberg is not that that the doctor
12 simply has a preference, but rather that there has to be
13 a significant body of medical opinion that says that
14 this a safer procedure and necessary for the safety of
15 the mother.

16 Now, where that's true, the Court has
17 previously said that the Constitution protects the
18 right. And I don't see anything in what Congress says
19 that wants to change that law. They simply have a
20 different view of the facts.

21 GENERAL CLEMENT: Well, they do have a
22 different view of the facts. And I guess the question
23 --

24 JUSTICE BREYER: So if they have a different
25 view of the facts, why can't we leave it up to whatever

1 facts develop? If there is an appropriate body of
2 medical opinion that does in fact believe this is
3 necessary for the health of the mother, so be it, and
4 the abortion could be performed and the injunction would
5 say that.

6 GENERAL CLEMENT: Well, I think --

7 JUSTICE BREYER: And otherwise not.

8 GENERAL CLEMENT: If this Court rejects the
9 facial challenge to this statute it is still going to be
10 open for litigants in the future to try to identify
11 certain conditions where this procedure is the safer
12 alternative.

13 JUSTICE KENNEDY: Can you tell me a
14 hypothetical instance in which where an as applied
15 challenge could be brought if we sustain the procedure
16 on its face? The procedure has to take place within 24,
17 48, 72 hours. How would as applied challenge take case?
18 And I have read all the doctors' testimony in this case
19 in this case, hundreds of pages, and I'm familiar with
20 the area generally. But it takes a while to get up to
21 speed. I don't know if you could just go to a district
22 judge and say I need an order, the judge would take --
23 would have to take many hours to understand that.

24 GENERAL CLEMENT: Justice Kennedy, what I
25 think I have in mind principally would be a

1 pre-enforcement challenge that was an as applied
2 challenge. And what I have in mind, you know that's
3 something that there is in other areas of the law,
4 Steffl against Thompson is an example. But what you
5 would have in mind is a doctor who had standing under
6 this Court's abortion jurisprudence would come in and
7 say, look, in my practice I've seen that this procedure
8 would be particularly useful in dealing with
9 preeclampsia or placental previa or some condition.

10 JUSTICE KENNEDY: Why isn't that already in
11 the, then, in the Ninth Circuit, in the Second Circuit
12 and in the Eighth Circuit, in the district courts,
13 proceedings in those circuits?

14 GENERAL CLEMENT: Well, there is an effort
15 to make that showing. I don't think that it's been a
16 successful effort to make that showing. In fact I think
17 if you look at the findings of the district courts in
18 these cases, two of the three district courts found that
19 there was no particular condition where the D&X abortion
20 was medically necessary or had marginal safe benefits --
21 safety benefits. In this case, the Nebraska case, the
22 district court identified only two conditions,
23 preeclampsia combined with maternal cancer, and placenta
24 previa. And as to those particular findings as we point
25 out in our reply brief, there are problems with each of

1 these findings.

2 JUSTICE KENNEDY: General Clement, I'm just
3 thinking, trying to imagine how an as applied challenge
4 would be really much different from what we have seen
5 already.

6 GENERAL CLEMENT: Well, I don't think, I
7 mean, they've challenge everything including every
8 application of the statute and they've tried to pick off
9 some particular conditions. What I'm imagining is in
10 the future you might have, you might have additional
11 evidence, you might have additional experience with
12 doctors, and they might come in and target their
13 challenge to particular conditions and try to say --

14 JUSTICE GINSBURG: But General -- General
15 Clement, conditions don't show up in the abstract.
16 Wouldn't it often be the case that it depends on the
17 vulnerability of the particular patient and you couldn't
18 bring a pre-enforcement challenge as to that. Maybe
19 it's a question of hemorrhaging, that -- it's a
20 combination of what the condition is and the
21 vulnerability of the particular patient and I don't see
22 how that could be tested in advance.

23 GENERAL CLEMENT: Well, Justice Ginsburg my
24 understanding is even when you talk about an
25 idiosyncratic condition, I mean, the doctors who perform

1 these abortions perform, you know, hundreds of them a
2 year and they can identify those conditions and they
3 have names for those conditions and I think it would be
4 amenable to bringing a more as applied challenge.

5 CHIEF JUSTICE ROBERTS: General, do you
6 understand the scope of this statute to be different
7 than the scope of the statute at issue in Stenberg,
8 focusing in particular on the deliberate and intentional
9 language?

10 GENERAL CLEMENT: I certainly do, Mr. Chief
11 Justice, and I think that this statute, unlike the
12 Nebraska statute, clearly uses an anatomical landmark
13 approach that is based in the text of the statute and
14 clearly distinguishes between the D&E procedure on one
15 hand and the D&X on the other hand.

16 JUSTICE SOUTER: But isn't it quite
17 independent of the anatomical approach that the health
18 exception is denied? I mean that's an -- that does not
19 depend on the anatomical approach. The anatomical
20 approach may be well be an answer at the facial
21 challenge stage, to problems of vagueness, for example.
22 But the health problem is not affected by that. And the
23 difficulty that I have with your argument that somehow
24 the health exception issue should be left to an as
25 applied challenge is the statement in Stenberg, and it's

1 on 938.

2 I'm quoting: "But where substantial medical
3 authority supports the proposition that banning a
4 particular abortion procedure could endanger women's
5 health, Casey requires the statute to include a health
6 exception where the procedure is necessary in
7 appropriate medical judgment for the preservation --"
8 -- excuse me -- "of the life or health of the mother."

9 Now, your position, it seems to me, requires
10 us to do one of three things. Either we, we overrule
11 Stenberg in that respect, or we, we find -- I don't know
12 how but we might find, well, in this case, there is no
13 substantial medical authority, and therefore on the face
14 of the statute there seems to be no impediment in the
15 Stenberg statement. Or three, we say well, there seems
16 to be a tension between the showing of substantial
17 medical authority which occurred in the litigation in
18 these cases and the findings made by Congress, and under
19 those circumstances in effect we are required to ignore
20 the record in the cases and go with Congress's
21 apparently contrary judgment.

22 Which of the three do we take?

23 GENERAL CLEMENT: Well, we would urge you to
24 take any one of them.

25 JUSTICE SOUTER: Take all three.

1 (Laughter.)

2 JUDGE SOUTER: No, but seriously --

3 GENERAL CLEMENT: But in fairness, I mean,
4 you know, we have an obligation to defend the statute.
5 So our first, you know, our first effort would be to say
6 we distinguish the --

7 JUSTICE SOUTER: Okay, but the problem, I
8 guess -- focus the problem this way. The, the Stenberg
9 opinion talks about substantial medical authority as
10 triggering this requirement for a statutory element.
11 That problem is not focused simply by saying Congress
12 made some findings and the district court made other
13 findings and Congress should prevail.

14 The fact is the substantial medical judgment
15 finding I would suppose is satisfied by the, by the
16 record in the district courts in these cases. This is
17 not one doctor's idiosyncratic judgment and a court can
18 reasonably find, it seems to me, that there is
19 substantial medical judgment. If we are going to defer,
20 as you say we should defer to Congress, haven't we got
21 to overrule that statement?

22 GENERAL CLEMENT: I don't think so, Justice
23 Souter. Let me just -- I'd like to save some time for
24 rebuttal, but let me try to answer it this way, which is
25 our way of looking at Stenberg is Stenberg really

1 doesn't address what you do when there are congressional
2 findings. And there is some tension between Stenberg
3 and Turner on this, because Stenberg seems to suggest,
4 well, when there is a doubt, the kind of doubt that
5 would normally get you past a summary judgment, you
6 defer to the doctors, and Turner seems to suggest when
7 you have a doubt, conflicting evidence, the kind of
8 doubt that might get you past summary judgment normally,
9 you defer to Congress. And it has to be one or the
10 other. It can't go both ways, can't go opposite ways,
11 and we would say resolve that tension, but when there is
12 congressional findings, something that you obviously
13 didn't have to confront in Stenberg, defer to the
14 congressional approach.

15 If Stenberg means something contrary, that
16 even in the face of congressional findings that you have
17 to defer to a minority opinion of doctors and, you know,
18 kind of invert what would normally be the way of
19 approaching it, we think then that would be inconsistent
20 with this Court's decision in Casey, among others, and
21 you should revisit Stenberg to that effect, to that
22 extent.

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you, General.

25 Miss Smith.

1 ORAL ARGUMENT OF PRISCILLA SMITH

2 ON BEHALF OF RESPONDENT

3 MS. SMITH: Mr. Chief Justice and may it
4 please the Court:

5 The government throughout this case has
6 quarreled with the plaintiff's statement of Stenberg and
7 Congress quarreled clearly with the district court
8 findings, but their real argument here is with this
9 Court in the Court's ruling in Stenberg, particularly in
10 light of the congressional findings that are, that are
11 frankly unsupported by either the congressional record
12 or the additional evidence presented to the district
13 courts. The only course here that preserves
14 independence of the judiciary, that exemplifies the
15 importance of stare decisis, not to mention the only
16 course that will protect women from needless risks of
17 uterine perforation, infertility, sepsis and hemorrhage,
18 is to hold this act unconstitutional.

19 JUSTICE KENNEDY: Can you tell me -- I
20 didn't find it in the materials. Maybe the statistics
21 aren't available. In the cases where intact D&E or D&Xs
22 are performed in the period I guess, what, 16 through
23 20, 21st, 22nd weeks, in how many of those instances, do
24 you have any idea, in how many of those instances is
25 there serious health risk to the mother that requires

1 the procedure as opposed to simply being an elective
2 procedure? Are there any statistics on that?

3 MS. SMITH: No. In terms of the underlying
4 medical conditions there really aren't, Your Honor, and
5 it varies dramatically according to the practice of the
6 physician. If a physician is in a high risk OBGYN
7 practice, he or she is much more likely to encounter
8 patients with serious underlying medical conditions such
9 as the ones that the doctors have testified about in
10 this case, the liver disease, kidney disease, heart,
11 cardiovascular disease, cancer of the placenta, bleeding
12 placenta previa, all of these issues and underlying
13 conditions that makes the impact and the risks that are
14 reduced by the intact D&E particularly important.

15 CHIEF JUSTICE ROBERTS: We have no evidence
16 either in the record before the Court or Congress as to
17 how often that situation arises?

18 MS. SMITH: No, we don't, Your Honor. We
19 know that in some practices it's quite frequent, in some
20 practices it's not as frequent because those are mostly
21 hospital-based practices. But on the other hand,
22 there's extensive evidence in this case, much more
23 evidence frankly, Your Honor, Justice Breyer, than there
24 was in the Stenberg case, of the, of the --

25 JUSTICE KENNEDY: A have just other question

1 that's generally related to the first. If there is
2 substantial evidence that other procedures or alternate
3 procedures are available, alternate to D&X, alternate to
4 intact D&E, is your response that, although they're
5 available as a matter of science, as a matter of, of
6 medical expertise, they are not available because
7 hospitals don't allow the patients to be admitted? I
8 was going to ask that same question to the government,
9 because there is some indication in the record that
10 certain hospitals just don't admit patients for this
11 purpose, which is -- goes back to my earlier question.
12 I was wondering if that's because it's shearly elective.

13 MS. SMITH: Because it's what sir?

14 JUSTICE KENNEDY: Because it's purely
15 elective and not medically necessary.

16 MS. SMITH: No, Your Honor. Hospitals,
17 many, many hospitals throughout the United States refuse
18 to provide any abortions whatsoever as just a blanket
19 rule. There are some that will provide abortions in
20 certain, in certain circumstances where the woman is
21 obtaining the abortion because of a certain medical
22 condition. Then there are women who are obtaining an
23 abortion because they have chosen that that's the best
24 course for them who also have underlying medical
25 conditions. So if you're a woman who has chosen to

1 obtain an abortion and you have an underlying cardiac
2 disease, for example -- we had a case like this in
3 Louisiana. The hospital refused to do the abortion
4 because her chance of dying from the underlying medical
5 condition was not over 50 percent. So the availability
6 of hospital services is somewhat unrelated to this case,
7 but it is, it is quite limited in some circumstances.

8 JUSTICE KENNEDY: Well, it might be related
9 in the sense that the government's argument that there
10 are alternate mechanisms is not a practical alternative.
11 I was going to ask the government about that. On the
12 other hand, the fact that any number of hospitals don't
13 allow the procedure is also indicated, indication that
14 there is a medical opinion against it.

15 MS. SMITH: No, not at all, Your Honor. The
16 medical opinion in those cases is against abortion
17 whatsoever and a refusal to use one's facilities to
18 provide any abortion --

19 JUSTICE BREYER: So in terms of --

20 MS. SMITH: -- of any kind, not about any
21 particular procedure.

22 I'm sorry, Justice Breyer.

23 JUSTICE BREYER: I didn't like your
24 characterization and the government's of the state of
25 the record. I asked my law clerk basically to go look

1 up every statement that was made in four forums. The
2 first was the first Stenberg case. Second was Congress.
3 Third is this, one of the cases here; and the fourth is
4 the other case here. Now, my own impression of that is
5 if you're talking about the medical need for such a
6 case, that is for intact D&E, that there is a risk
7 attached if you don't use it in some instances. The
8 fewest number of statements for that proposition was in
9 the first Stenberg.

10 MS. SMITH: Yes.

11 JUSTICE BREYER: More statements in
12 Congress, more statements that you -- doctors who say, I
13 need this procedure for safety.

14 MS. SMITH: There are many more in this --

15 JUSTICE BREYER: There are many more in this
16 case than there were -- in these two cases there are
17 many more than there were in Congress and in Congress
18 there are many more than they were in first Stenberg.

19 MS. SMITH: That's right.

20 JUSTICE BREYER: Now, if we look to the
21 other side of the coin, the doctors who say, no, it
22 isn't safe, there I'd have to say there are probably
23 many more in Congress than there are -- who say it isn't
24 safe, there are probably many more in Congress; and then
25 there are some in these cases, too; and there are hardly

1 any in Stenberg, not too many.

2 MS. SMITH: Well, there is --

3 JUSTICE BREYER: It was against you, in
4 other words.

5 MS. SMITH: There are many letters written
6 to Congress that are in the record. In terms of live
7 witnesses, Your Honor --

8 JUSTICE BREYER: Yes.

9 MS. SMITH: -- there were in Congress eight
10 live witnesses that testified.

11 JUSTICE BREYER: All right, so I'm left with
12 a record where I guess you have a subjective
13 characterization that there is at least as much evidence
14 in these cases supporting you and as much in Congress
15 supporting you as there was in the first Stenberg case.
16 But Congress made this finding, so what am I to do with
17 the finding?

18 MS. SMITH: Right. Well, the important
19 point, Your Honor, is that even if the Court applied the
20 highest level of deference under Turner, the findings
21 would be rejected and must be rejected, as all three
22 district courts, held because they're simply
23 unreasonable even under a Turner standard.

24 JUSTICE GINSBURG: Ms. Smith, was the
25 statement of the American college Obstetricians and

1 Gynecologists before Congress?

2 MS. SMITH: Yes, Your Honor, it was, as was
3 the brief that was filed, the amicus brief that was
4 filed in this case in Stenberg was before Congress, and
5 also testimony from numerous physicians in the form of a
6 letter. In terms of live witnesses, there were simply
7 not that many.

8 CHIEF JUSTICE ROBERTS: We'll give you an
9 extra 30 seconds. Proceed.

10 MS. SMITH: That's fine, Your Honor. I've
11 lost track of my thought, however, I think.

12 I think from the statement there were eight
13 witnesses who testified live.

14 JUSTICE BREYER: My question basically I
15 think you might have been going after is, I was saying
16 that I agreed with you in that there is more evidence
17 supporting your side in these cases than there was
18 before Congress, than there was in first Stenberg.

19 MS. SMITH: Yes.

20 JUSTICE BREYER: But still there was a
21 finding in Congress and there wasn't a finding in the
22 Nebraska legislature, and so does that fact of the
23 finding being in Congress and not in the Nebraska
24 legislature -- what kind of legal difference does that
25 make?

1 MS. SMITH: And Your Honor, what I would say
2 in this case, it makes none. While it's an extremely
3 interesting academic question about the level of
4 deference that should be applied in this kind of
5 circumstance, here it really is academic because under,
6 even under the Turner standard, if applied in a way that
7 Turner actually applied deference, to carefully review
8 the findings in light of the evidence in Congress and
9 again in light of the evidence in the district court --

10 JUSTICE STEVENS: May I ask you this
11 question about what you think we should do. If I
12 thought the evidence did support the conclusion that
13 it's never medically necessary, it merely -- the
14 evidence merely supports the proposition that a doctor
15 has to be a lot more careful if he goes one way rather
16 than the other because there are more risks involved in
17 one procedure rather than the other, would that be
18 sufficient to support the -- I can see the argument that
19 the intact delivery may have less risk of complications
20 and so forth without it not necessarily being absolutely
21 necessary.

22 MS. SMITH: Well, I think there is, there's
23 been some confusion about the word "necessary" and it's
24 been used sometimes to talk about whether there are
25 other procedures that could be used, as opposed to the

1 determination that it is the safest procedure that
2 reduces significantly the risk of very serious
3 complications, not the risks of minor complications.

4 CHIEF JUSTICE ROBERTS: I guess that gets
5 back to the point earlier. I mean, do you agree with
6 the discussion earlier that this act is not going to
7 prevent abortions?

8 MS. SMITH: No, not at all, Your Honor. I
9 -- the issue of the scope and breadth of the law is -- I
10 think the evidence clearly shows that this is a very
11 broad law that applies to D&E abortions and, contrary to
12 what the Solicitor General said about the intent of
13 abortions, abortion providers like Dr. Rabacker and
14 others, they actually, their intent is always to remove
15 the fetus as intact as possible, and the district courts
16 have recognized that as an intent that's covered under
17 the terms of the act.

18 CHIEF JUSTICE ROBERTS: What degree of
19 marginal impact on safety do you think is necessary to
20 override the State's interest? I mean, if you have
21 complications under the D&E procedure in say 10 percent
22 of the cases, complications under D&X in 9.99 percent of
23 the case s, is that marginal benefit in safety enough to
24 override the State's articulated interest?

25 MS. SMITH: I don't believe a marginal

1 benefit in safety is enough and I don't believe that's
2 what we have here. The testimony from over, from at
3 least 11 board-certified OBGYNs, from the American
4 College of Obstetricians and Gynecologists, is that the
5 reduction in risk is significant and that it reduces the
6 risk of serious complications, such as uterine
7 perforation, which that lead to hysterectomies and
8 infertility.

9 CHIEF JUSTICE ROBERTS: But I thought your
10 submission earlier is that we don't have any record
11 evidence about how often the complications arise, so
12 it's hard to get a handle on exactly what the difference
13 is in terms of safety under your submission.

14 MS. SMITH: We don't have a quantification
15 of the safety. What we what we have is the clinical
16 experience of major leading physicians in the field,
17 who've testified that they've used both procedures. In
18 fact, many of them have testified that they perforated
19 uteruses in non-intact D&Es and they've never perforated
20 a uterus in an intact D&E. And that in fact is borne
21 out by the Chasen study, a very small study with very
22 small numbers, but it shows all the serious
23 complications are in the non-intact group.

24 JUSTICE GINSBURG: If we could go back to
25 the first question that the Chief asked you, you said

1 yes, it will prevent abortions because of this uncertain
2 line between the D&X and the D&E. Is there a way that
3 Congress could have written the statute that would have
4 insulated the physician who's performing a D&E?

5 MS. SMITH: Absolutely, Your Honor. I think
6 that the blueprint that this Court laid out, that
7 certainly is suggested in Justice O'Connor's concurrence
8 in Stenberg, was rejected by Congress. She references
9 three statutes, that if they had included a health
10 exception, she thinks would have been constitutional.
11 They all include the word intact.

12 I think there's another narrower
13 construction of the Act too that is possible. Adding in
14 the word intact, reading in the word intact, it seems to
15 me, is not a reasonable interpretation of the statute as
16 it is, but certainly Congress could have done that and
17 other states have done it, but Congress set out not to
18 do that.

19 JUSTICE SOUTER: May I ask you to focus on
20 one particular problem that I think is implicated by
21 Justice Ginsburg's question. If I understood you
22 correctly a moment ago, and I think this is in your
23 briefs too, you said that the definitional problem is
24 that doctors always set out to do an intact procedure if
25 they can, because it involves less risk to the mother

1 from, from acts performed inside. And if that's the
2 case, then it would be, I guess in the real world, very
3 difficult for Congress to define a difference between
4 D&E and D&X, because the intention is always, as you
5 understand it, to have an intact result.

6 Your brother on the other side, the
7 Solicitor General says there certainly is testimony to
8 the effect that that is not so. That doctors who intend
9 to perform a D&E simply intend at the beginning to have
10 a lesser degree of dilation which will force them to do
11 the D&E and not have a totally intact procedure.

12 Would you comment on what I think is the
13 factual difference between you and the Solicitor General
14 there?

15 MS. SMITH: Yes, Your Honor. The -- the
16 problem with the law is that because it's not limited to
17 intact, it would in fact cover the procedures that are
18 performed by physicians who intend to perform a
19 procedure as intact as possible but simply don't expect
20 that.

21 JUSTICE SOUTER: I understand that.

22 MS. SMITH: Yes.

23 JUSTICE SOUTER: But could you start simply
24 with the factual predicate for your argument and his
25 argument. You seem to be starting from, if I understand

1 the two of you correctly, you seem to be starting from
2 basically different factual assumptions. Could you,
3 could you start by commenting on that?

4 MS. SMITH: Yes. The doctors perform the
5 same dilation protocols whether they are going to
6 perform a D&E or an intact D&E, and that's true for
7 Dr. Chasen and Dr. Westhoff, who performed both intact
8 and non-intact procedures.

9 CHIEF JUSTICE ROBERTS: I thought the
10 evidence was that you're looking for a different degree
11 of dilation if you're intending to perform D&E than if
12 -- and you're looking for a greater degree if you're
13 intending to perform a D&X.

14 MS. SMITH: It doesn't play out that way.
15 Doctors do have different dilation protocols, but they
16 are often looking for as much dilation as they can get.
17 On the other hand --

18 CHIEF JUSTICE ROBERTS: Is your submission
19 that there aren't dilation protocols if you're intending
20 a D&E and if you're intending a D&X, they're the same?

21 MS. SMITH: It varies by doctor. For
22 example, Dr. Carhart uses the same dilation protocol
23 whether he's going to do an intact or a non-intact.
24 Other doctors might try to do more dilation. And the
25 doctors, importantly, can't control the amount of

1 dilation they get, so a decision happens.

2 JUSTICE SOUTER: Well, they may not be able
3 to control it in an absolute sense, but can't they go
4 about it in a way that would tend to produce less rather
5 than more dilation?

6 MS. SMITH: Not --

7 JUSTICE SOUTER: It can't guarantee results,
8 but couldn't they at least start with a, I don't know
9 how you put it, a procedure that would be likely to
10 produce less rather than more, and hence come within the
11 safe harbor, if you will, of the statute?

12 MS. SMITH: Well, they are always looking
13 for a minimal amount of dilation. Then people who chose
14 to do another day of dilation, for example, that could
15 add additional dilation. But for the first day of
16 dilation, no, Your Honor. They don't seek more or less
17 over one day. They might do a second day or --

18 JUSTICE SOUTER: Well, you say they don't,
19 but my question is, can they? And the record may not
20 show this. I'm not asking you to answer the impossible,
21 but do we have evidence that would indicate that they
22 can or that they can't?

23 MS. SMITH: Not in the first day of
24 dilation, no. They can't control how much dilation is
25 going to occur. They need a minimal amount and they are

1 not going to shoot for less than that.

2 JUSTICE SOUTER: Can you tell us where to
3 look in the record for the evidence on that?

4 MS. SMITH: Each doctor testifies about
5 their own dilation protocols, Your Honor, and I believe
6 that's in the Eighth Circuit appendix. Those -- those
7 -- portions of that testimony, and are cited more
8 specifically in the Eighth Circuit briefs, which goes
9 more into the factual detail, Your Honor, but I don't
10 have the cites right now. I'm sorry.

11 JUSTICE GINSBURG: If there were a health
12 exception --

13 MS. SMITH: Yes.

14 JUSTICE GINSBURG: The health of the woman,
15 would that obviate the vagueness and overbreadth
16 problems that you bring up? Because then after we say
17 to the doctor, you put the health of your patients first
18 and if you think that it's riskier for her health to do
19 it one way than another way, then you pick this way. If
20 you had that, then wouldn't the concerns about
21 overbreadth fade?

22 MS. SMITH: Not if this is not limited to
23 intact, Your Honor, because then you would be limiting
24 D&E abortions, which is 95 percent of all abortions, to
25 circumstances where the doctor could prove that it was

1 in fact the safest procedure. And we've had doctors
2 testify in trial, for example, that they refused to
3 describe even intact or regular D&Es to their patients
4 because they believe induction is always safer. So
5 those doctors, I think would still be at risk, and it
6 would put 95 percent of second trimester abortions at
7 risk in that case, to prosecution for performing a D&E
8 when you should have been performing an induction
9 procedure.

10 CHIEF JUSTICE ROBERTS: Do you think the, on
11 the same issue I think, that the addition of the
12 deliberately and intentionally language in the
13 congressional act addresses that concern?

14 MS. SMITH: No, Your Honor, because actually
15 that same language is in the Stenberg, the Nebraska
16 statute. It also was targeted at deliberately
17 intentionally. I do think that if there is a
18 construction that would narrow the law to a limited
19 amount of intact D&Es, if you read the "for the purpose
20 of" language in the statute, to be performing an overt
21 act for the sole purpose of completing delivery, then --
22 or rather -- I'm sorry. For the purpose of performing
23 an overt act that causes fetal demise, that does not
24 facilitate delivery of the statute -- of the fetus.

25 JUSTICE KENNEDY: That's what I was

1 wondering, because --

2 MS. SMITH: I'm sorry.

3 JUSTICE KENNEDY: Suppose, this might help,
4 suppose the physician testifies that I wanted to do a
5 non-intact, an in utero D&E, that that's, that was my
6 intent, that's what I wanted to do, that's what I always
7 want to do. In this case I had an intact delivery and
8 had no other choice. Are you saying that we could
9 interpret the statute to say that that is not the
10 prohibited criminal intent, he is immune from
11 prosecution in that case?

12 MS. SMITH: No. I don't believe that's the
13 line that could be drawn, Your Honor, because anyone who
14 does a D&E is intending to remove the fetus as intact as
15 possible, and always can have the intent to go to the
16 anatomical landmark that's here. I'm suggesting a
17 different interpretation that uses the "for the purpose
18 of" language where it says for the purpose of performing
19 an overt act that the person knows will kill the
20 partially delivered living fetus. If that language was
21 interpreted to be for the sole purpose of performing
22 fetal demise at that point, rather than what the doctors
23 do, which is perform the action that causes fetal demise
24 in order to facilitate delivery of the fetus. So if
25 it's not to facilitate delivery of the fetus --

1 JUSTICE KENNEDY: Well, give me one instance
2 in which your proposed interpretation would work in the
3 real world.

4 MS. SMITH: Well, there are allegations in
5 the Congressional Record, for example, in reference --
6 in Justice Thomas' dissent by Schaffer, Dr. Pamela
7 Smith, about circumstances where the physician actually
8 holds the fetus in the woman's body in order to cause
9 fetal demise, rather than causing fetal demise because
10 it's an integral part of removal of the fetus from the
11 woman's uterus. And those circumstances would be banned
12 under that interpretation.

13 But I want to get back to the Turner point,
14 if I may for a minute, the issue of deference to
15 congressional finding.

16 JUSTICE KENNEDY: Well, just on that last
17 point, I mean, we are interested of course in different
18 interpretations, but it just seems to me that your
19 interpretation would have very little practical effect.

20 MS. SMITH: Well, it would -- it would ban
21 certainly a certain type of intact procedure that was
22 discussed, and I think the image many people have of
23 "partial-birth abortion" frankly, that this is something
24 that's done gratuitously, not as an integral part of
25 making this procedure the safest for the woman, and

1 avoiding instrumentation and avoiding perforation and
2 hysterectomies, which are serious complications that
3 though rare, when they occur, they are catastrophic and
4 life changing and disastrous. So the numbers are not
5 high of any complications, but the complications when
6 they occur are, are devastating. And this is what the
7 doctors are experiencing when they perform intact D&Es,
8 that they are not having these types of complications.

9 So -- if I can move to the deference point,
10 I would like to talk a little bit about deference to
11 congressional findings because there is significant
12 authority from this Court of course, saying that where
13 there are danger signs of constitutional risks, as the
14 Court recently said in *Randall versus Sorrell*, that the
15 Court must independently and carefully review
16 congressional findings. And the Court has rejected
17 findings that attempted to change either by findings of
18 fact or legal findings, that attempted to change a
19 constitutional standard.

20 But in any case, the findings in this case
21 are simply unreasonable and not supported by the
22 evidence. If you go to the findings themselves, the
23 ultimate finding in 14o, which claims that it is
24 actually relying on the preceding findings, it says,
25 "for these reasons, Congress finds that partial birth

1 abortion is never medically indicated," and then you go
2 backwards and look at the reasons. The reasons are the
3 findings that are not defended by the government, that
4 were not defended by the government witnesses and that
5 are blatantly false, except for perhaps one of them.

6 There are findings of, that partial-birth
7 abortion poses serious risks. The government witnesses
8 agreed that this was not true.

9 Their findings that partial-birth abortion
10 is not taught in medical schools. Of course, we know
11 that is simply not true, it's an integral part of
12 abortion training at major medical institutions like
13 Cornell, Columbia, Yale, NYU, Northwestern, etc.

14 It says that abortion, partial-birth
15 abortion is a disfavored practice along abortion
16 providers. That is absolutely not true.

17 And it says that there are no comparative
18 studies. We know now that is not true because the
19 Chasen study has come out, and is the first study of its
20 kind to try to evaluate the differences between intact
21 and non-intact. It is still true that there are no
22 controlled studies, there is no randomized clinical
23 trial, but if that were the standard, no new and safer
24 abortion procedures could ever be developed.

25 Turn back, Your Honors, to the health issue.

1 CHIEF JUSTICE ROBERTS: Could I ask you just
2 one thing?

3 MS. SMITH: Yes.

4 CHIEF JUSTICE ROBERTS: The statute, of
5 course, refers to both feet first and vertex deliveries.
6 How common is the vertex delivery in the D&X?

7 MS. SMITH: Not very common. Not very
8 common, Your Honor. It would occur in circumstances
9 where there is a significant fetal anomaly and some kind
10 of a, something called a sides, or another type of fetal
11 anomaly where there is a distension of the abdomen, but
12 it's very rare.

13 CHIEF JUSTICE ROBERTS: And in giving your
14 arguments toward the safety benefits of the D&X, I
15 couldn't understand why they wouldn't also apply to the
16 total delivery of the fetus in a vertex delivery
17 situation.

18 MS. SMITH: I'm sorry. I don't know if I
19 understand.

20 CHIEF JUSTICE ROBERTS: Well, my
21 understanding is that the vertex, the skull and head are
22 already outside the mother.

23 MS. SMITH: Yes.

24 CHIEF JUSTICE ROBERTS: And the objection in
25 the feet first is that you want fewer instrument

1 passes and so on.

2 MS. SMITH: Yes.

3 CHIEF JUSTICE ROBERTS: But in that case,
4 it's not the skull itself that is preventing the
5 delivery of the fetus.

6 MS. SMITH: Right.

7 CHIEF JUSTICE ROBERTS: So your arguments
8 about why the D&X is safer than feet first, wouldn't
9 that apply in the case of total delivery of the fetus as
10 well? In other words, if you want as much of the fetus
11 intact and out as possible, why wait, stop it halfway?
12 Wouldn't the safety argument suggest delivery of the
13 fetus?

14 MS. SMITH: Yes, but these are circumstances
15 where the fetus can't be delivered. That's the point,
16 Your Honor, is that the fetus is obstructed and so the
17 overt act that takes place is --

18 CHIEF JUSTICE ROBERTS: In the case of a
19 vertex delivery, where is the obstruction?

20 MS. SMITH: The obstruction would come from
21 a distension of the abdomen, usually from a fetal
22 anomaly like a sides, which is, this is a serious
23 anomaly. It's lethal anomalies that I was talking
24 about. And in those circumstances, an overt act would
25 need to be performed that would in fact cause fetal

1 demise before the fetus could be, the delivery could be
2 continued.

3 JUSTICE KENNEDY: It seems to me that your
4 argument is that there is always a constitutional right
5 to use what the physician thinks is the safest
6 procedure.

7 MS. SMITH: No, Your Honor. I think the --

8 JUSTICE KENNEDY: I inferred that from your
9 comments.

10 MS. SMITH: I don't think so, Your Honor.
11 What, what the Court held in Stenberg in applying the
12 appropriate medical judgment standard of Casey, was that
13 there had to be a substantial body of medical opinion,
14 an objective standard that in fact supports the use of
15 that procedure. And that both, that balances concerns
16 against protecting a woman's health with a concern of
17 unfettered discretion, which the Court has rejected.

18 JUSTICE KENNEDY: So then, you think there
19 are instances in which the state can require that a
20 procedure be used, even if it's not the safest
21 procedure?

22 MS. SMITH: I'm sorry. I --

23 JUSTICE KENNEDY: So then, the --

24 MS. SMITH: Yeah.

25 JUSTICE KENNEDY: The obverse of the

1 proposition I put at first, it must be true that there
2 are some instances in which the state can prohibit a
3 procedure even if it is the safest procedure.

4 MS. SMITH: That's true, Your Honor, as long
5 as it doesn't pose an undue burden on the woman, which
6 as you know, certainly the circumstance with the D&E,
7 which is 95 percent of abortions, under the Stenberg
8 ruling.

9 CHIEF JUSTICE ROBERTS: Can I just follow up
10 on that?

11 MS. SMITH: Yes.

12 CHIEF JUSTICE ROBERTS: I don't understand
13 that. In other words, the fact that it's not the safest
14 procedure does not itself constitute an undue burden?
15 In other words, under Justice Kennedy's hypothetical --

16 MS. SMITH: I don't understand what you
17 mean.

18 CHIEF JUSTICE ROBERTS: He said that the
19 state can prohibit something even if it is the safest
20 procedure, and your answer was so long as it doesn't --

21 MS. SMITH: No.

22 CHIEF JUSTICE ROBERTS: -- pose an undue
23 burden. And I was just following up to say that so, in
24 some circumstances, prohibiting what you think is the
25 safest procedure does not itself constitute an undue

1 burden.

2 MS. SMITH: No. I understood Justice
3 Kennedy's question to be, could the state prohibit what
4 it thinks is not the safest. And under the Stenberg
5 ruling, although the Court hasn't addressed that
6 question directly, under Stenberg what the Court has
7 said is, the Court can ban procedures only where there
8 is not significant medical authority supporting their
9 use as the safest procedure in some circumstances. So
10 perhaps I misunderstood your question.

11 But the Court has not ever addressed the
12 question, can we ban a procedure that's not the safest.
13 I think the ruling in Stenberg would say well, there has
14 to be significant medical authority that in some
15 circumstances it is the safest. The alternative
16 argument would be, but, if it is the procedure that's
17 used in 95 percent of the cases, or a vast majority of
18 the cases, and banning it would thereby deny women the
19 right to get an abortion and be a substantial obstacle
20 in their path in obtaining a legal abortion, that would
21 be the reason why you can't ban it.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 Miss Smith.

24 MS. SMITH: Thank you.

25 CHIEF JUSTICE ROBERTS: General Clement, you

1 have two minutes remaining.

2 REBUTTAL ARGUMENT OF PAUL D. CLEMENT

3 ON BEHALF OF PETITIONER

4 GENERAL CLEMENT: Thank you, Mr. Justice. I
5 would like to start with a few points in rebuttal.

6 I'd like to start with Justice Kennedy's
7 comment, and the answer to that is there will always be
8 an alternative available as a practical matter. The
9 alternative will always be the D&E procedure, which the
10 district court in this case called the gold standard.
11 And the best evidence of that, Justice Kennedy, is that
12 their own witnesses like Dr. Chasen, for example, when
13 they set out to perform the D&X procedure, they are only
14 successful about 33 percent of the time. What happens
15 in the other 67 percent of the cases is they actually,
16 even though they tried to perform a D&X, will perform a
17 D&E. And so all of the clinics that provide D&X also
18 necessarily provide D&E, because the D&E is what they
19 end up with if they are not able to remove the fetus
20 intact. So in every single case, there are some, you
21 know, the induction procedure has to be done in a
22 hospital, but the D&X and D&E procedures are both
23 equally available in clinics, so no woman as either a
24 theoretical matter or a practical matter, is going to be
25 denied a safe alternative to end her pregnancy.

1 I wanted to pick up on Justice Souter's
2 question as well. You asked for factual citations in
3 the record on this dispute between us. I think the
4 record is really overwhelmingly in our favor. I point
5 you to Dr. Fitzhugh, who's one of the plaintiffs on this
6 side. 1305a, he says he doesn't try for intact delivery
7 in every case because it would necessitate a second
8 round of dilation, a second round of laminarias, so he
9 doesn't do the second round, he gets dismemberment.
10 Dr. Knorr, another one of the plaintiffs, at page 142a,
11 he says the procedure would require greater dilation.

12 And if I could just finish on the citations,
13 Dr. Vibhakar, who does dismemberment 100 percent of the
14 time, 148a -- all of these are in the petition appendix
15 of the district court opinion -- Dr. Cranen explains his
16 procedure at 174a to 177a. Thank you

17 CHIEF JUSTICE ROBERTS: Thank you, General.
18 The case is submitted.

19 (Whereupon, at 11:07 a.m., the case in the
20 above-entitled matter was submitted.)

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A	addressed 52:5 52:11	16:20	assumptions 40:2	basis 11:22
abdomen 48:11 49:21	addresses 43:13	anyway 14:7	attached 32:7	becoming 12:7
aberrant 4:23	addressing 11:13	apparently 25:21	attempt 15:8	beginning 39:9
able 11:23 19:13 41:2 53:19	admit 30:10	APPEARAN... 1:15	attempted 46:17 46:18	begins 14:20,25
abortion 4:2,17 4:20 12:5 14:2 16:4,6,11,17 16:19,23 17:14 21:4 22:6,19 25:4 30:21,23 31:1,3,16,18 36:13 45:23 47:1,7,9,12,14 47:15,15,24 52:19,20	admitted 30:7	appendix 42:6 54:14	ATTORNEY 1:4	behalf 1:17,19 2:4,7,10 3:7 28:2 53:3
abortions 3:12 3:21 4:11 5:1 5:15 17:7,9 24:1 30:18,19 36:7,11,13 38:1 42:24,24 43:6 51:7	advance 23:22	application 23:8	atypical 4:23	believe 21:2 36:25 37:1 42:5 43:4 44:12
above-entitled 1:12 54:20	advocating 19:4	applied 12:23 21:14,17 22:1 23:3 24:4,25 33:19 35:4,6,7	authority 25:3 25:13,17 26:9 46:12 52:8,14	benefit 36:23 37:1
absolute 41:3	ago 38:22	applies 12:13,21 36:11	availability 31:5	benefits 22:20 22:21 48:14
absolutely 35:20 38:5 47:16	agreed 19:16 34:16 47:8	apply 4:9 18:1 20:6 48:15 49:9	available 3:22 28:21 30:3,5,6 53:8,23	best 16:16 30:23 53:11
abstract 23:15	agrees 18:9	applying 50:11	avoiding 46:1,1	better 20:4
academic 35:3,5	AL 1:7	approach 24:13 24:17,19,20 27:14	a.m 1:14 3:2 54:19	big 14:21
achieve 7:4 18:6	ALBERTO 1:3	approaching 19:19,21 27:19	B	birth 46:25
act 13:1,6,8 14:17 15:3 28:18 36:6,17 38:13 43:13,21 43:23 44:19 49:17,24	alive 15:9,19	appropriate 19:8 21:1 25:7 50:12	B 18:7,9	bit 46:10
action 44:23	allegations 45:4	appropriately 15:25	babies 13:16 16:4	blanket 30:18
acts 39:1	allow 5:12 30:7 31:13	area 18:2 21:20	back 20:10 30:11 36:5 37:24 45:13 47:25	blatantly 47:5
add 41:15	alternates 30:2,3 30:3 31:10	areas 22:3	backwards 47:2	bleeding 29:11
Adding 38:13	alternative 21:12 31:10 52:15 53:8,9 53:25	argument 1:13 2:2,5,8 3:3,6 9:13,16 24:23 28:1,8 31:9 35:18 39:24,25 49:12 50:4 52:16 53:2	balances 50:15	blueprint 38:6
addition 43:11	alternatives 3:22	arguments 9:21 48:14 49:7	ban 4:1,8,16 5:12 16:3 20:6 45:20 52:7,12 52:21	blurred 4:1
additional 23:10 23:11 28:12 41:15	amenable 24:4	arises 29:17	banned 3:14 45:11	board-certified 37:3
address 27:1	American 33:25 37:3	articulated 36:24	banning 12:25 25:3 52:18	body 20:13 21:1 45:8 50:13
	amicus 34:3	asking 41:20	bans 12:21 16:5 20:6	borne 37:20
	amount 40:25 41:13,25 43:19	assuming 4:6	based 3:17 10:20 24:13	breadth 36:9
	amply 3:19		basic 14:25	Breyer 7:21 8:16,18 9:4 17:17,22 18:2 18:5,14,15,19 19:19 20:8,24 21:7 29:23 31:19,22,23 32:11,15,20 33:3,8,11 34:14,20
	anatomical 24:12,17,19,19 44:16		basically 5:5 9:23 17:1 31:25 34:14 40:2	brief 22:25 34:3 34:3
	anomalies 49:23			briefs 5:4 38:23 42:8
	anomaly 48:9,11 49:22,23			
	answer 11:11 24:20 26:24 41:20 51:20 53:7			
	anybody 4:24			

bright 15:1 16:11	49:9,18 53:10 53:20 54:7,18 54:19	characterizati... 31:24 33:13	Clement 1:16 2:3,9 3:5,6,8 4:3,12 5:8 7:12 8:16 9:4 10:5 10:10,19 11:2 11:10 12:10,19 13:4,9,11,17 13:21 14:8,12 14:16,22 15:10 15:17,23 16:9 17:11,21,25 18:4,13,17 19:18 20:21 21:6,8,24 22:14 23:2,6 23:15,23 24:10 25:23 26:3,22 52:25 53:2,4	complications 35:19 36:3,3 36:21,22 37:6 37:11,23 46:2 46:5,5,8 concern 43:13 50:16 concerns 42:20 50:15 conclusion 7:24 8:21,25 9:3 35:12 concurrence 38:7 condition 22:9 22:19 23:20,25 30:22 31:5 conditions 19:24 21:11 22:22 23:9,13,15 24:2,3 29:4,8 29:13 30:25 conflicting 27:7 confront 27:13 confronted 9:13 confusion 35:23 Congress 3:10 3:20,24 4:7,9 4:19,21 5:12 7:23,24 8:6,12 10:1,6,11,15 11:9,14,19,21 11:24 12:1,24 13:24 14:5,18 15:21 16:3 17:2,13 18:5,7 18:8,12,14,24 19:1,11,12,14 19:15,15,16 20:5,18 25:18 26:11,13,20 27:9 28:7 29:16 32:2,12 32:17,17,23,24 33:6,9,14,16 34:1,4,18,21 34:23 35:8
bring 23:18 42:16	cases 5:7 6:22 7:11,16,20,23 8:5,24 14:11 20:10,10 22:18 25:18,20 26:16 28:21 31:16 32:3,16,25 33:14 34:17 36:22 52:17,18 53:15	Chasen 6:10,25 7:18 37:21 40:7 47:19 53:12 Chasens 20:2 Chief 3:3,8 24:5 24:10 27:24 28:3 29:15 34:8 36:4,18 37:9,25 40:9 40:18 43:10 48:1,4,13,20 48:24 49:3,7 49:18 51:9,12 51:18,22 52:22 52:25 54:17	clerk 31:25 clinical 37:15 47:22 clinics 53:17,23 coin 32:21 college 33:25 37:4 Columbia 47:13 combination 23:20 combined 22:23 come 4:24 22:6 23:12 41:10 47:19 49:20 comes 4:19 comment 39:12 53:7 commenting 40:3 comments 50:9 common 4:5,10 48:6,7,8 comparative 47:17 compare 7:22 9:25 10:1 complete 15:13 completing 43:21	
brought 21:15	Casey 25:5 27:20 50:12	child 13:20 15:3 15:13,15 choice 44:8 chose 13:24 41:13 chosen 30:23,25 Circuit 7:8,8,8 22:11,11,12 42:6,8 circuits 22:13 circumstance 35:5 51:6 circumstances 25:19 30:20 31:7 42:25 45:7,11 48:8 49:14,24 51:24 52:9,15 citations 54:2,12 cited 9:19 42:7 cites 42:10 claims 46:23 clarify 12:11 classically 14:2 clear 3:20 5:22 clearly 10:6,9,13 10:15 15:11,12 16:15 24:12,14 28:7 36:10		
burden 9:16 51:5,14,23 52:1	cause 45:8 49:25 causes 43:23 44:23 cause-specific 19:22 causing 45:9 caveat 17:25 centimeters 6:6 6:7,16 certain 9:5 12:21 16:3 21:11 30:10,20 30:20,21 45:21 certainly 8:17 24:10 38:7,16 39:7 45:21 51:6 cervix 6:4,6,15 7:10 challenge 21:9 21:15,17 22:1 22:2 23:3,7,13 23:18 24:4,21 24:25 chance 14:11 31:4 chances 14:13 change 20:19 46:17,18 changing 46:4			
C				
C 2:1 3:1 California 7:15 call 13:20 15:4 15:21 called 48:10 53:10 cancer 22:23 29:11 cardiac 31:1 cardiovascular 29:11 careful 35:15 carefully 35:7 46:15 Carhart 1:7 3:4 40:22 case 3:4 4:14 5:18,22 6:1,11 7:15,18,24 8:7 8:9,20 10:4 11:5,18 15:24 16:21 17:6 19:12 20:3 21:17,18,19 22:21,21 23:16 25:12 28:5 29:10,22,24 31:2,6 32:2,4,6 32:16 33:15 34:4 35:2 36:23 39:2 43:7 44:7,11 46:20,20 49:3				

38:3,8,16,17 39:3 46:25 Congresses 3:11 congressional 3:15,18 7:7 8:12 27:1,12 27:14,16 28:10 28:11 43:13 45:5,15 46:11 46:16 Congress's 16:10 25:20 considered 8:7 constitute 51:14 51:25 Constitution 18:11 20:17 constitutional 4:7 38:10 46:13,19 50:4 construction 38:13 43:18 context 15:11,13 16:25 continued 50:2 contrary 9:17 9:22 10:25 11:3,23 25:21 27:15 36:11 contrast 6:8,25 15:17 control 40:25 41:3,24 controlled 47:22 Cornell 47:13 correct 10:18,20 correctly 38:22 40:1 count 8:9 counting 8:3 couple 5:9 course 5:14 6:18 28:13,16 30:24 45:17 46:12 47:10 48:5 court 1:1,13 3:9 4:16 5:22 7:11	8:21 9:6,8,9,10 9:13,15,17,18 9:19 10:2,22 10:25 11:3,4,9 11:12,15,18,20 11:20,23 19:1 19:6,6 20:16 21:8 22:22 26:12,17 28:4 28:7,9 29:16 33:19 35:9 38:6 46:12,14 46:15,16 50:11 50:17 52:5,6,7 52:11 53:10 54:15 courts 10:1 22:12,17,18 26:16 28:13 33:22 36:15 Court's 4:13 18:17 22:6 27:20 28:9 cover 39:17 covered 36:16 Cranen 54:15 credibility 11:21 12:1 Creinin 5:24 6:5 6:23 7:13 criminal 44:10 critical 9:11 current 10:7 curriculum 10:12,14,20,24 <hr/> D D 1:16 2:3,9 3:1 3:6 53:2 Danforth 4:14 4:15 danger 46:13 day 41:14,15,17 41:17,23 deal 4:20 dealing 22:8 decision 18:18	27:20 41:1 decisis 28:15 defend 26:4 defended 47:3,4 defer 26:19,20 27:6,9,13,17 deference 3:14 8:12,15,17,18 8:20,25 9:1 11:16 33:20 35:4,7 45:14 46:9,10 deficit 9:5 define 39:3 definition 14:13 definitional 38:23 degree 6:16 36:18 39:10 40:10,12 deliberate 24:8 deliberately 43:12,16 deliver 15:7 delivered 44:20 49:15 deliveries 48:5 delivery 13:7 14:20,25 15:13 35:19 43:21,24 44:7,24,25 48:6,16,16 49:5,9,12,19 50:1 54:6 demise 5:13,15 14:1,3,7,20,24 15:2 16:21 17:4 43:23 44:22,23 45:9 45:9 50:1 democratically 8:14 denied 24:18 53:25 deny 52:18 Department 1:17	depend 24:19 depends 14:9 23:16 deposition 7:14 describe 43:3 despite 8:20 detail 42:9 determination 36:1 determinations 3:15 determining 3:12 devastating 46:6 develop 21:1 developed 47:24 difference 5:6 5:11,19 34:24 37:12 39:3,13 differences 5:6 6:12 47:20 different 3:11 4:19 6:19,20 7:3,3 8:4 9:3 9:19 11:8,21 13:16 17:8 20:20,22,24 23:4 24:6 40:2 40:10,15 44:17 45:17 differentiate 17:3 difficult 39:3 difficulty 24:23 dilate 6:4,15 7:10 dilates 6:6 dilation 6:13,16 6:17 39:10 40:5,11,15,16 40:19,22,24 41:1,5,13,14 41:15,16,24,24 42:5 54:8,11 dimension 16:15 directly 52:6 disagree 18:20	disagreeing 18:12 disastrous 46:4 discretion 50:17 discussed 45:22 discussing 9:6 discussion 36:6 disease 29:10,10 29:11 31:2 disfavored 47:15 dismemberme... 4:6 6:1,22 54:9 54:13 dispute 54:3 disregard 10:25 dissent 45:6 distension 48:11 49:21 distinguish 26:6 distinguishes 24:14 district 5:22 7:11 9:10,17 9:19 10:2,22 10:24 11:3,4,9 11:12,15,18,20 11:20,22 21:21 22:12,17,18,22 26:12,16 28:7 28:12 33:22 35:9 36:15 53:10 54:15 divided 19:3,5 doctor 18:6 19:13 20:7,11 22:5 35:14 40:21 42:4,17 42:25 doctors 5:23 6:8 7:4,6,9,25 8:1 8:4,5,8,10 18:23,25 19:25 20:1 21:18 23:12,25 27:6 27:17 29:9 32:12,21 38:24
--	---	--	--	--

39:8 40:4,15 40:24,25 43:1 43:5 44:22 46:7 doctor's 20:9 26:17 dog 4:22 doing 18:8 doubt 13:7 27:4 27:4,7,8 dozens 3:11 Dr 5:24,25 6:5 6:10,10,14,21 6:23,25 7:1,13 7:17,18,18 20:2,2 36:13 40:7,7,22 45:6 53:12 54:5,10 54:13,15 dramatically 29:5 draw 15:1 17:3 drawn 44:13 driving 17:18 dying 31:4 D&E 4:5 6:1,4 6:23 24:14 28:21 29:14 30:4 32:6 36:11,21 37:20 38:2,4 39:4,9 39:11 40:6,6 40:11,20 42:24 43:7 44:5,14 51:6 53:9,17 53:18,18,22 D&Es 37:19 43:3,19 46:7 D&X 4:8,25 6:11 7:1 9:14 20:1,3 22:19 24:15 30:3 36:22 38:2 39:4 40:13,20 48:6,14 49:8 53:13,16,17,22 D&Xs 28:21	D.C 1:9,17 <hr/> E <hr/> E 2:1 3:1,1 earlier 30:11 36:5,6 37:10 effect 12:25 25:19 27:21 39:8 45:19 effectively 11:4 effort 4:16 22:14 22:16 26:5 eight 9:21 33:9 34:12 Eighth 7:7 22:12 42:6,8 either 13:20,22 25:10 28:11 29:16 46:17 53:23 elected 8:14 elective 29:1 30:12,15 element 26:10 encounter 29:7 endanger 25:4 ends 6:22 enjoin 19:7 ensure 14:19 entirely 15:8 entitled 3:24 11:16 equally 53:23 erroneous 10:6 ESQ 1:16,19 2:3 2:6,9 ET 1:7 evaluate 47:20 everybody 18:24 evidence 3:17,20 6:20 9:2 10:22 11:2 19:21,25 23:11 27:7 28:12 29:15,22 29:23 30:2 33:13 34:16	35:8,9,12,14 36:10 37:11 40:10 41:21 42:3 46:22 53:11 evidentiary 7:16 exactly 10:15 37:12 example 6:5,13 6:14,21 10:7 22:4 24:21 31:2 40:22 41:14 43:2 45:5 53:12 examples 5:23 6:9 exception 8:23 19:17 24:18,24 25:6 38:10 42:12 excuse 25:8 exemplifies 28:14 expect 39:19 experience 23:11 37:16 experiencing 46:7 expert 5:24 7:13 expertise 30:6 experts 6:10 expire 15:8,15 explains 54:15 extensive 29:22 extent 27:22 extra 34:9 extremely 35:2 <hr/> F <hr/> face 21:16 25:13 27:16 faces 9:16 facial 21:9 24:20 facilitate 43:24 44:24,25 facilities 31:17 fact 6:19 9:14	15:21 21:2 22:16 26:14 31:12 34:22 37:18,20 39:17 43:1 46:18 49:25 50:14 51:13 facts 20:20,22 20:25 21:1 factual 10:3 11:15 39:13,24 40:2 42:9 54:2 fact-finding 3:15 fade 42:21 fair 7:23 14:23 14:23 fairness 26:3 false 47:5 familiar 3:14 21:19 far 14:19 favor 54:4 feet 13:13 48:5 48:25 49:8 fetal 5:13,15 13:25 14:3,19 14:24 15:2 16:21 17:4 43:23 44:22,23 45:9,9 48:9,10 49:21,25 fetus 4:6 5:16 12:5,8,17,18 12:23 13:1,20 13:25 14:4,6 15:3,7,18 16:1 16:6 17:19 36:15 43:24 44:14,20,24,25 45:8,10 48:16 49:5,9,10,13 49:15,16 50:1 53:19 fetuses 12:6 13:14 17:15 fewer 8:8 48:25	fewest 32:8 field 37:16 filed 34:3,4 find 12:3,8,20 25:11,12 26:18 28:20 finding 8:12 9:17,18 10:11 10:17,25 11:1 11:5,21 12:2 18:20 26:15 33:16,17 34:21 34:21,23 45:15 46:23 findings 4:9 9:24 10:6 11:7 11:15,23 12:1 12:3,4,6,8,9,16 12:16,24 22:17 22:24 23:1 25:18 26:12,13 27:2,12,16 28:8,10 33:20 35:8 46:11,16 46:17,17,18,20 46:22,24 47:3 47:6,9 finds 19:9 46:25 fine 18:19 34:10 finish 54:12 first 3:4 5:10 9:15 11:11 26:5,5 30:1 32:2,2,9,18 33:15 34:18 37:25 41:15,23 42:17 47:19 48:5,25 49:8 51:1 Fitzhugh 54:5 five 13:15 focus 9:8 12:12 18:3 26:8 38:19 focused 9:9 26:11 focusing 17:18
---	---	--	---	---

<p>24:8 follow 51:9 following 51:23 force 39:10 form 34:5 formed 13:16 former 9:24 forth 9:20 35:20 forums 32:1 found 9:10 10:11 11:9,9 22:18 four 3:10 9:19 13:15 32:1 fourth 32:3 frankly 28:11 29:23 45:23 Frederickson 6:10,14 7:1,18 Fredericksons 20:2 frequent 29:19 29:20 front 8:6 fully 7:10 13:16 furthering 3:25 future 21:10 23:10</p> <hr/> <p style="text-align: center;">G</p> <p>G 3:1 GEN 1:16 2:3,9 3:6 General 1:4,16 3:5,8 4:3,12 5:8 7:12 8:16 9:4 10:5,10,19 11:2,10 12:10 12:19 13:4,9 13:11,17,21 14:8,12,16,22 15:10,17,23 16:9 17:11,21 17:25 18:4,13 18:17 19:18 20:21 21:6,8 21:24 22:14</p>	<p>23:2,6,14,14 23:23 24:5,10 25:23 26:3,22 27:24 36:12 39:7,13 52:25 53:4 54:17 generally 21:20 30:1 Ginsberg 16:9 Ginsburg 4:3,13 5:3,8 15:16,23 17:6,12 23:14 23:23 33:24 37:24 42:11,14 Ginsburg's 38:21 give 34:8 45:1 given 18:18 giving 8:24 48:13 gnat 17:25 go 4:21 5:25 21:21 25:20 27:10,10 31:25 37:24 41:3 44:15 46:22 47:1 goes 30:11 35:15 42:8 going 3:25 7:21 13:12 15:14 17:9,19,24 21:9 26:19 30:8 31:11 34:15 36:6 40:5,23 41:25 42:1 53:24 gold 53:10 Gonzales 1:3 3:4 good 18:8 government 28:5 30:8 31:11 47:3,4,7 government's 31:9,24 gratuitously 45:24</p>	<p>greater 6:16 40:12 54:11 group 37:23 gruesome 4:1 guarantee 41:7 guess 8:3 13:20 20:22 26:8 28:22 33:12 36:4 39:2 Gynecologists 34:1 37:4</p> <hr/> <p style="text-align: center;">H</p> <p>half 6:7 halfway 5:16 13:14,19 14:4 15:4 49:11 hallmark 5:14 hand 24:15,15 29:21 31:12 40:17 handle 37:12 happens 41:1 53:14 harbor 41:11 hard 4:24 37:12 head 15:20 48:21 health 3:13 8:23 16:18 18:10,21 19:9,16 21:3 24:17,22,24 25:5,5,8 28:25 38:9 42:11,14 42:17,18 47:25 50:16 hear 3:3 heard 3:11 11:18 hearings 3:10 7:7 heart 29:10 held 3:10 9:6 33:22 50:11 help 44:3 hemorrhage 28:17</p>	<p>hemorrhaging 23:19 high 29:6 46:5 highest 33:20 hold 28:18 holds 45:8 Honor 29:4,18 29:23 30:16 31:15 33:7,19 34:2,10 35:1 36:8 38:5 39:15 41:16 42:5,9,23 43:14 44:13 48:8 49:16 50:7,10 51:4 Honors 47:25 hospital 31:3,6 53:22 hospitals 30:7 30:10,16,17 31:12 hospital-based 29:21 hours 14:9 15:19 21:17,23 hundreds 21:19 24:1 hypothetical 21:14 51:15 hysterectomies 37:7 46:2</p> <hr/> <p style="text-align: center;">I</p> <p>idea 10:14 28:24 identified 22:22 identify 21:10 24:2 idiosyncratic 23:25 26:17 ignore 25:19 illustrate 16:12 illustration 16:16 image 45:22 imagine 23:3 imagining 23:9</p>	<p>immune 44:10 impact 29:13 36:19 impediment 25:14 implicated 38:20 importance 28:15 important 5:11 12:11 16:25 29:14 33:18 importantly 40:25 impossible 41:20 impression 32:4 inches 12:7 13:1 13:15 include 10:24 25:5 38:11 included 38:9 including 20:11 23:7 inconsistent 27:19 independence 28:14 independent 24:17 independently 46:15 indicate 41:21 indicated 31:13 47:1 indication 30:9 31:13 indifferent 16:21 induced 14:1,4 induces 15:2 inducing 4:17 induction 43:4,8 53:21 infanticide 4:2 15:7,12,15 16:4,12 17:14</p>
---	--	--	---	--

inferences 3:17	interested 45:17	15:6,16,23	kind 11:16 27:4	legitimate 3:25
inferred 50:8	interesting 35:3	16:9 17:6,12	27:7,18 31:20	LEROY 1:7
infertility 28:17	interestingly 8:4	17:17,22 18:2	34:24 35:4	lesser 39:10
37:8	interests 3:25	18:5,14,15,19	47:20 48:9	lethal 13:1,6,8
injunction 21:4	interpret 44:9	19:18 20:8,24	Knorr 54:10	15:3 49:23
inside 4:6 16:7	interpretation	21:7,13,24	know 8:9 10:13	letter 34:6
39:1	38:15 44:17	22:10 23:2,14	10:14,14,19	letters 33:5
instance 21:14	45:2,12,19	23:23 24:5,11	14:17,24 15:18	level 5:10 33:20
45:1	interpretations	24:16 25:25	19:5,22 21:21	35:3
instances 28:23	45:18	26:7,22 27:24	22:2 24:1	life 16:18 25:8
28:24 32:7	interpreted	28:3,19 29:15	25:11 26:4,5	46:4
50:19 51:2	44:21	29:23,25 30:14	27:17 29:19	light 28:10 35:8
institutions	interrupt 13:3	31:8,19,22,23	41:8 47:10,18	35:9
47:12	introduced 7:16	32:11,15,20	48:18 51:6	limited 17:7
instruction 10:8	10:22	33:3,8,11,24	53:21	31:7 39:16
instrument	invert 27:18	34:8,14,20	knows 44:19	42:22 43:18
48:25	involved 35:16	35:10 36:4,18		limiting 42:23
instrumentation	involves 4:5	37:9,24 38:7	L	line 4:2 12:14
46:1	38:25	38:19,21 39:21	lacked 8:23	14:24 15:1
insulated 38:4	isolate 11:12	39:23 40:9,18	laid 38:6	16:11,13,14
intact 28:21	issue 11:13 13:8	41:2,7,18 42:2	laminaria 6:15	17:1,1,3,14
29:14 30:4	13:9,11 14:21	42:11,14 43:10	laminarias 54:8	38:2 44:13
32:6 35:19	24:7,24 36:9	43:25 44:3	landmark 24:12	lines 8:3
36:15 37:20	43:11 45:14	45:1,6,16 48:1	44:16	litigants 21:10
38:11,14,14,24	47:25	48:4,13,20,24	language 12:5	litigation 25:17
39:5,11,17,19	issues 29:12	49:3,7,18 50:3	24:9 43:12,15	little 45:19
40:6,7,23		50:8,18,23,25	43:20 44:18,20	46:10
42:23 43:3,19	J	51:9,12,15,18	large 5:6	live 15:20 33:6
44:7,14 45:21	judge 21:22,22	51:22 52:2,22	Laughter 26:1	33:10 34:6,13
46:7 47:20	26:2	52:25 53:4,6	law 16:20 20:19	liver 29:10
49:11 53:20	judgment 3:24	53:11 54:1,17	22:3 31:25	living 13:24 14:4
54:6	14:19 25:7,21		36:9,11 39:16	17:23 44:20
integral 45:10	26:14,17,19	K	43:18	long 3:16 13:15
45:24 47:11	27:5,8 50:12	keep 15:9	lawful 15:7	51:4,20
intend 39:8,9,18	judiciary 28:14	Kennedy 7:6,12	16:17,19	look 5:21 8:2,3
intending 40:11	jurisprudence	21:13,24 22:10	lead 37:7	10:4 18:23
40:13,19,20	22:6	23:2 28:19	leading 37:16	22:7,17 31:25
44:14	Justice 1:17 3:3	29:25 30:14	leave 20:25	32:20 42:3
intent 36:12,14	3:8 4:3,12 5:3	31:8 43:25	led 5:12	47:2
36:16 44:6,10	5:8 7:6,12,21	44:3 45:1,16	left 24:24 33:11	looking 26:25
44:15	8:16,18 9:4	50:3,8,18,23	legal 34:24	40:10,12,16
intention 39:4	10:5,17,21	50:25 53:11	46:18 52:20	41:12
intentional 24:8	11:7,10,25	Kennedy's	legislation 4:15	lost 34:11
intentionally	12:10,15,20	51:15 52:3	16:2	lot 10:21 35:15
43:12,17	13:3,5,10,13	53:6	legislature 8:13	Louisiana 31:3
interest 16:11	13:17,19,22	kidney 29:10	8:14 9:9 34:22	
17:13 36:20,24	14:6,10,15,18	kill 44:19	34:24	M

maintaining 16:11 17:13	21:25 22:2,5	need 6:4 12:11	33:25 37:4	overrule 25:10
major 37:16	minimal 41:13	19:23,24 21:22	obstructed	26:21
47:12	41:25	32:5,13 41:25	49:16	overt 43:20,23
majority 4:17	minor 36:3	49:25	obstruction	44:19 49:17,24
17:9 52:17	minority 5:1	needless 28:16	49:19,20	overwhelmingly
making 45:25	27:17	never 3:12,21	obtain 31:1	11:3 54:4
marginal 22:20	minute 45:14	35:13 37:19	obtaining 30:21	owe 8:11,13,15
36:19,23,25	minutes 53:1	47:1	30:22 52:20	8:17,18
material 6:12	misunderstood	new 1:19 10:23	obverse 50:25	owed 8:21 9:1
materials 28:20	52:10	47:23	obviate 42:15	O'Connor's
maternal 22:23	modestly 6:5	Ninth 7:8 22:11	obviously 9:5	38:7
matter 1:12	moment 38:22	nonviable 12:5	27:12	<hr/>
10:16 17:8,20	morning 3:4	12:13,18	occur 41:25 46:3	P
30:5,5 53:8,24	mother 5:16	non-intact 37:19	46:6 48:8	P 3:1
53:24 54:20	8:23 18:10,22	37:23 40:8,23	occurred 25:17	page 2:2 54:10
mean 8:13 9:5	19:10 20:15	44:5 47:21	occurs 15:3	pages 12:3 21:19
10:10 13:23	21:3 25:8	non-viable	Oh 18:13	Pamela 45:6
14:23 19:15	28:25 38:25	12:23	Okay 17:22	part 7:16 9:11
20:5 23:7,25	48:22	normal 11:16	18:19 26:7	10:12,24 13:6
24:18 26:3	mother's 15:5	normally 27:5,8	ones 29:9	45:10,24 47:11
36:5,20 45:17	16:18,22	27:18	one's 31:17	partial 46:25
51:17	move 46:9	Northwestern	open 15:20	partially 44:20
meaningful 5:19	multiple 6:14	47:13	21:10	partial-birth
means 27:15	murder 15:21	noted 9:20	opinion 5:22 9:6	3:12,20 45:23
mechanisms	16:23	November 1:10	9:7,11,12,12	47:6,9,14
31:10	<hr/>	number 31:12	9:18,22 19:3,5	particular 4:14
medical 5:4 10:7	N	32:8	19:9 20:13	5:7 7:13,18
19:3,5,8 20:13	N 2:1,1 3:1	numbers 4:23	21:2 26:9	9:10 19:23
21:2 25:2,7,13	names 24:3	7:3 8:3 37:22	27:17 31:14,16	22:19,24 23:9
25:17 26:9,14	narrow 43:18	46:4	50:13 54:15	23:13,17,21
26:19 29:4,8	narrower 38:12	numerous 34:5	opposed 11:9	24:8 25:4
30:6,21,24	Nebraska 5:24	NYU 47:13	12:9 29:1	31:21 38:20
31:4,14,16	8:20,22,25 9:8	N.Y 1:19	35:25	particularly 4:1
32:5 47:10,12	22:21 24:12	<hr/>	opposite 27:10	5:18 22:8 28:9
50:12,13 52:8	34:22,23 43:15	O	oral 1:12 2:2,5	29:14
52:14	Nebraska's 9:13	O 2:1 3:1	3:6 28:1	pass 20:5
medically 3:13	necessarily	OBGYN 29:6	order 21:22	passed 15:21
3:21 22:20	15:15 35:20	OBGYNs 37:3	44:24 45:8	passes 49:1
30:15 35:13	53:18	object 19:14	outside 14:5	path 52:20
47:1	necessary 3:13	objection 48:24	15:5 16:8,22	patient 23:17,21
mention 28:15	3:21 18:10,21	objections 9:23	17:2 48:22	patients 29:8
merely 35:13,14	18:25 19:2,9	objective 7:2,5	outweigh 9:24	30:7,10 42:17
method 4:10,17	20:14 21:3	50:14	overbreadth	43:3
4:20 16:3,6	22:20 25:6	obligation 26:4	42:15,21	PAUL 1:16 2:3
18:6,7,9	30:15 35:13,21	obstacle 4:14	overcome 11:23	2:9 3:6 53:2
mind 10:15	35:23 36:19	52:19	override 36:20	people 41:13
	necessitate 54:7	Obstetricians	36:24	45:22

percent 6:21,24 31:5 36:21,22 42:24 43:6 51:7 52:17 53:14,15 54:13	piece 4:15 place 5:14,15 14:20 16:22 17:4 21:16 49:17 placenta 22:23 29:11,12 placental 22:9 plaintiffs 5:25 7:17 54:5,10 plaintiff's 5:24 6:10 28:6 play 40:14 please 3:9 28:4 point 6:9 12:11 13:22,25 14:25 16:5 17:12 22:24 33:19 36:5 44:22 45:13,17 46:9 49:15 54:4 points 5:9 53:5 portions 42:7 pose 3:13 51:5 51:22 poses 47:7 position 25:9 possible 36:15 38:13 39:19 44:15 49:11 post-viability 15:11 16:17,19 16:25 17:7 practical 31:10 45:19 53:8,24 practice 22:7 29:5,7 47:15 practices 29:19 29:20,21 pre 14:9 precedence 4:13 preceding 8:24 46:24 predicate 39:24 preeclampsia 22:9,23 preferable	14:19 preference 20:9 20:12 prefers 20:7 pregnancy 3:23 53:25 presented 28:12 preservation 25:7 preserve 16:6 preserved 16:1 preserves 28:13 prevail 26:13 prevent 36:7 38:1 prevented 3:23 preventing 12:25 49:4 previa 22:9,24 29:12 previability 14:13 16:14 previously 20:17 pre-enforcem... 22:1 23:18 pre-viability 15:12 17:10,15 primarily 19:1 primary 4:20 principally 7:15 21:25 principles 3:14 prior 13:6 20:10 20:10 PRISCILLA 1:19 2:6 28:1 probably 17:11 32:22,24 problem 16:17 16:18 19:12,19 24:22 26:7,8 26:11 38:20,23 39:16 problems 22:25 24:21 42:16 procedure 4:1,5	4:23,23,25 5:4 6:2,4,12,23,23 7:2 9:14 10:8 12:22,24 13:15 14:2 15:2 17:4 17:18 19:7,13 19:23,24 20:1 20:3,6,7,14 21:11,15,16 22:7 24:14 25:4,6 29:1,2 31:13,21 32:13 35:17 36:1,21 38:24 39:11,19 41:9 43:1,9 45:21,25 50:6 50:15,20,21 51:3,3,14,20 51:25 52:9,12 52:16 53:9,13 53:21 54:11,16 procedures 5:12 5:20 6:19,20 12:22 30:2,3 35:25 37:17 39:17 40:8 47:24 52:7 53:22 Proceed 34:9 proceeding 4:8 proceedings 22:13 produce 41:4,10 prohibit 51:2,19 52:3 prohibited 44:10 prohibiting 51:24 proposed 45:2 proposition 25:3 32:8 35:14 51:1 prosecution 43:7 44:11 protect 28:16 protecting 50:16	protects 20:17 protocol 40:22 protocols 40:5 40:15,19 42:5 prove 42:25 provide 10:8 30:18,19 31:18 53:17,18 provided 10:12 providers 36:13 47:16 purely 30:14 purpose 30:11 43:19,21,22 44:17,18,21 put 41:9 42:17 43:6 51:1 <hr/> Q <hr/> quantification 37:14 quarreled 28:6 28:7 question 8:11 16:2 20:9,22 23:19 29:25 30:8,11 34:14 35:3,11 37:25 38:21 41:19 52:3,6,10,12 54:2 quite 4:18 9:16 15:25 24:16 29:19 31:7 quoting 25:2 <hr/> R <hr/> R 1:3 3:1 Rabacker 36:13 raising 16:2 Randall 46:14 randomized 47:22 rare 46:3 48:12 reach 8:25 9:3 reaction 19:5 read 9:12,22 12:1,2 21:18
---	--	---	---	---

<p>43:19 reading 9:7 38:14 real 28:8 39:2 45:3 really 5:19 23:4 26:25 29:4 35:5 54:4 reason 18:8 52:21 reasonable 3:16 38:15 reasonably 26:18 reasoning 4:8 reasons 17:16 19:22 46:25 47:2,2 rebuttal 2:8 26:24 53:2,5 recognized 15:25 36:16 recognizes 16:24 record 3:18 4:4 5:21,21 7:17 7:19,22 9:20 9:25 10:3,13 18:23 25:20 26:16 28:11 29:16 30:9 31:25 33:6,12 37:10 41:19 42:3 45:5 54:3 54:4 reduced 29:14 reduces 36:2 37:5 reduction 37:5 refer 20:10 reference 12:4 45:5 referenced 9:18 references 38:8 referring 7:10 12:6 refers 12:17,17</p>	<p>48:5 reflects 6:21 10:13 refusal 31:17 refuse 30:17 refused 31:3 43:2 regard 12:22 regimen 6:13 regular 43:3 rejected 33:21 33:21 38:8 46:16 50:17 rejects 21:8 related 30:1 31:8 relevant 11:14 16:15 relying 46:24 remaining 53:1 remarkable 12:21 removal 45:10 remove 36:14 44:14 53:19 reply 22:25 represent 3:16 require 18:11 50:19 54:11 required 25:19 requirement 26:10 requires 25:5,9 28:25 requiring 13:5 residents 10:16 resolve 27:11 respect 4:4,10 5:20 17:15 19:18 25:11 Respondent 1:20 2:7 28:2 Respondents 5:18 response 5:9 30:4 result 3:24 18:6</p>	<p>39:5 results 41:7 review 11:8,16 35:7 46:15 revisit 27:21 right 4:7 13:18 14:15 16:10 17:12,20,21 18:4,13,15,16 18:19 19:11 20:18 32:19 33:11,18 42:10 49:6 50:4 52:19 ripped 15:20 risk 28:25 29:6 32:6 35:19 36:2 37:5,6 38:25 43:5,7 riskier 42:18 risks 3:13 28:16 29:13 35:16 36:3 46:13 47:7 ROBERTS 3:3 24:5 27:24 29:15 34:8 36:4,18 37:9 40:9,18 43:10 48:1,4,13,20 48:24 49:3,7 49:18 51:9,12 51:18,22 52:22 52:25 54:17 robust 10:3 round 54:8,8,9 row 13:12 rule 30:19 ruling 28:9 51:8 52:5,13 <hr/> S <hr/> s 2:1 3:1 36:23 safe 3:21 8:1,1,6 8:8 18:25 22:20 32:22,24 41:11 53:25</p>	<p>safer 9:14 20:4 20:14 21:11 43:4 47:23 49:8 safest 36:1 43:1 45:25 50:5,20 51:3,13,19,25 52:4,9,12,15 safety 18:10,22 19:2,9,17 20:14 22:21 32:13 36:19,23 37:1,13,15 48:14 49:12 satisfied 3:19 26:15 save 26:23 saying 18:7 26:11 34:15 44:8 46:12 says 9:23 20:13 20:18 39:7 44:18 46:24 47:14,17 54:6 54:11 Scalia 13:19,22 15:6 Schaffer 45:6 schools 10:8,23 47:10 science 30:5 scope 24:6,7 36:9 second 4:10,17 4:20 5:1,18 7:8 22:11 32:2 41:17 43:6 54:7,8,9 seconds 14:7,8 34:9 Section 9:11 see 17:17 18:11 18:23,25 20:18 23:21 35:18 seek 41:16 seen 22:7 23:4 sense 16:14 31:9</p>	<p>41:3 sepsis 28:17 serious 28:25 29:8 36:2 37:6 37:22 46:2 47:7 49:22 seriously 26:2 services 31:6 set 6:11,18 7:1 38:17,24 53:13 sets 6:14 seven 12:3 shearly 30:12 shoot 42:1 show 23:15 41:20 showing 22:15 22:16 25:16 shows 36:10 37:22 side 19:21,25 32:21 34:17 39:6 54:6 sides 9:2 12:13 48:10 49:22 significant 20:13 37:5 46:11 48:9 52:8,14 significantly 36:2 signs 46:13 similar 4:4,9 8:15 simply 20:12,19 26:11 29:1 33:22 34:6 39:9,19,23 46:21 47:11 single 6:11 12:3 12:16 20:3 53:20 sir 30:13 situation 4:19 29:17 48:17 situations 11:12 11:17</p>
--	--	---	--	--

six 3:10 12:2	10:10 42:8	9:6 10:2,4	27:5,8	28:19 42:2
skull 48:21 49:4	speed 21:21	20:11 24:7,25	support 35:12	telling 18:24,25
small 5:1 37:21	stage 24:21	25:11,15 26:8	35:18	temporal 16:13
37:22	stand 4:14 5:13	26:25,25 27:2	supported 46:21	tend 41:4
Smith 1:19 2:6	standard 3:19	27:3,13,15,21	supporting	tension 25:16
27:25 28:1,3	11:8 33:23	28:6,9 29:24	33:14,15 34:17	27:2,11
29:3,18 30:13	35:6 46:19	32:2,9,18 33:1	52:8	term 4:17
30:16 31:15,20	47:23 50:12,14	33:15 34:4,18	supports 5:21	terminating
32:10,14,19	53:10	38:8 43:15	25:3 35:14	3:23
33:2,5,9,18,24	standing 22:5	50:11 51:7	50:14	terminology
34:2,10,19	stare 28:15	52:4,6,13	suppose 11:15	13:22,23,24
35:1,22 36:8	start 5:5 39:23	Stenberg's	26:15 44:3,4	terms 17:18
36:25 37:14	40:3 41:8 53:5	18:18	supposed 8:9	29:3 31:19
38:5 39:15,22	53:6	Stevens 10:5,17	Supposing	33:6 34:6
40:4,14,21	starting 39:25	10:21 11:7,10	10:21	36:17 37:13
41:6,12,23	40:1	11:25 12:10,15	Supreme 1:1,13	tested 23:22
42:4,13,22	state 8:13,14	12:20 13:3,5	sure 12:10 13:4	testified 7:7
43:14 44:2,12	9:21 31:24	13:10,13,17	14:22	11:19 29:9
45:4,7,20 48:3	50:19 51:2,19	14:6,10,15,18	survive 14:14	33:10 34:13
48:7,18,23	52:3	35:10	15:14 17:19	37:17,18
49:2,6,14,20	statement 10:7	stop 49:11	surviving 14:11	testifies 42:4
50:7,10,22,24	24:25 25:15	struck 4:16	sustain 21:15	44:4
51:4,11,16,21	26:21 28:6	studies 47:18,22		testify 7:11 43:2
52:2,23,24	32:1 33:25	study 37:21,21	T	testimony 6:6
sole 43:21 44:21	34:12	47:19,19	T 2:1,1	7:14,19 8:4
Solicitor 1:16	statements 32:8	subjective 33:12	tail 4:22	21:18 34:5
36:12 39:7,13	32:11,12	submission	take 8:14 18:8	37:2 39:7 42:7
somebody 15:18	states 1:1,13	37:10,13 40:18	21:16,17,22,23	text 12:9 24:13
15:20	30:17 38:17	submitted 54:18	25:22,24,25	Thank 27:23,24
somewhat 31:6	State's 36:20,24	54:20	taken 5:10 7:14	52:22,24 53:4
Sorrell 46:14	statistics 28:20	substantial 3:17	7:14	54:16,17
sorry 31:22	29:2	25:2,13,16	takes 5:13,15	theoretical
42:10 43:22	statute 8:22 12:9	26:9,14,19	14:20 16:21	53:24
44:2 48:18	12:12,21 15:1	30:2 50:13	17:4 21:20	thing 9:15 48:2
50:22	15:22 17:3	52:19	49:17	things 25:10
sort 8:2	18:1 19:7,20	successful 7:2	talk 20:10 23:24	think 4:12,13,18
Souter 24:16	20:5 21:9 23:8	22:16 53:14	35:24 46:10	4:24 5:2,10,10
25:25 26:2,7	24:6,7,11,12	suffer 14:7	talking 12:15	5:17,20 7:13
26:23 38:19	24:13 25:5,14	sufficient 35:18	14:12 15:25	7:20,25 8:1,17
39:21,23 41:2	26:4 38:3,15	suggest 27:3,6	17:23 32:5	8:17,20 9:25
41:7,18 42:2	41:11 43:16,20	49:12	49:23	10:2,12,17
Souter's 54:1	43:24 44:9	suggested 38:7	talks 26:9	11:2,4,5,17,22
spatial 16:15	48:4	suggesting	target 23:12	12:7,11,19
17:1,14	statutes 38:9	44:16	targeted 43:16	13:21,25 14:1
speak 4:22	statutory 26:10	suggestion 5:17	taught 47:10	14:5,7,16
specific 12:24	Steffl 22:4	suggests 4:24	teaching 10:16	15:12,14,17,21
specifically	Stenberg 7:22	summary 14:23	tell 20:2 21:13	15:24 16:10,13

16:16,16,19,24 17:11,12 18:13 18:14,21 21:6 21:25 22:15,16 23:6 24:3,11 26:22 27:19 34:11,12,15 35:11,22 36:10 36:19 38:5,12 38:20,22 39:12 42:18 43:5,10 43:11,17 45:22 50:7,10,18 51:24 52:13 54:3 thinking 23:3 thinks 16:20 38:10 50:5 52:4 third 7:5 32:3 Thomas 45:6 Thompson 22:4 thought 8:19 34:11 35:12 37:9 40:9 three 7:16,20 22:18 25:10,15 25:22,25 33:21 38:9 time 7:5 20:6 26:23 53:14 54:14 times 9:19 told 5:3 total 48:16 49:9 totally 39:11 track 34:11 training 47:12 trial 43:2 47:23 tried 15:18 17:2 23:8 53:16 tries 4:19 triggering 26:10 trimester 4:11 4:21 5:1 43:6 trivialize 16:10 true 17:15 20:16	40:6 47:8,11 47:16,18,21 51:1,4 try 6:1 21:10 23:13 26:24 40:24 47:20 54:6 trying 6:3 23:3 Turn 47:25 turned 11:6 Turner 27:3,6 33:20,23 35:6 35:7 45:13 turns 13:23 two 5:11,20 6:6 6:7,9 7:9,23 8:5 17:16 22:18,22 32:16 40:1 53:1 type 45:21 48:10 types 46:8 <hr/> U ultimate 46:23 uncertain 38:1 unconstitutio... 8:22 28:18 underlying 29:3 29:8,12 30:24 31:1,4 undermine 11:5 understand 11:25 13:14 21:23 24:6 39:5,21,25 48:15,19 51:12 51:16 understanding 23:24 48:21 understood 14:3 38:21 52:2 undue 51:5,14 51:22,25 unfettered 50:17 United 1:1,13 30:17	universe 17:19 University 10:23 unreasonable 33:23 46:21 unrelated 31:6 unsupported 28:11 upheld 3:16 urge 25:23 use 6:13 13:21 13:24 19:7,8 31:17 32:7 50:5,14 52:9 useful 22:8 uses 6:14 24:12 40:22 44:17 usually 49:21 Ute 13:12 uterine 28:17 37:6 utero 5:14 14:1 15:2 16:22 17:5 44:5 uterus 37:20 45:11 uteruses 37:19 <hr/> V v 1:6 vagueness 24:21 42:15 varies 29:5 40:21 various 9:21 vast 17:8 52:17 versus 12:12 16:14 46:14 vertex 48:5,6,16 48:21 49:19 viability 12:14 16:14 viable 12:6,12 12:17,23 Vibhakar 5:25 6:21 7:17 54:13	view 20:20,22 20:25 vs 3:4 vulnerability 23:17,21 <hr/> W wait 49:11 want 11:11 15:4 18:9 19:4 20:4 44:7 45:13 48:25 49:10 wanted 44:4,6 54:1 wants 20:19 Washington 1:9 1:17 wasn't 11:13 34:21 way 4:18 5:5 11:11 16:12 19:19,20 26:8 26:24,25 27:18 35:6,15 38:2 40:14 41:4 42:19,19,19 ways 27:10,10 Wednesday 1:10 weeks 28:23 went 4:22 Westhoff 40:7 We'll 3:3 34:8 we're 15:25 we've 43:1 whatsoever 30:18 31:17 whichever 15:4 who've 37:17 witnesses 3:11 11:19 33:7,10 34:6,13 47:4,7 53:12 woman 3:22 30:20,25 42:14 45:25 51:5 53:23	woman's 45:8 45:11 50:16 womb 4:6 14:5 15:5 16:7,22 17:2,2 women 28:16 30:22 52:18 women's 25:4 wondering 30:12 44:1 word 12:8,16 35:23 38:11,14 38:14 words 33:4 49:10 51:13,15 work 45:2 world 39:2 45:3 worried 19:15 wouldn't 4:8 12:20 14:6 19:6 20:8 23:16 42:20 48:15 49:8,12 written 33:5 38:3 wrong 10:9 19:12,16 wrote 9:7 <hr/> X x 1:2,8 <hr/> Y Yale 10:23 47:13 Yeah 50:24 year 24:2 York 1:19 10:23 <hr/> 0 05-380 1:6 3:4 <hr/> 1 10 36:21 10:05 1:14 3:2 100 6:21 54:13 11 37:3 11:07 54:19
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<p>1305a 54:6 14o 46:23 142a 54:10 148a 54:14 16 28:22 174a 54:16 177a 54:16</p> <hr/> <p>2</p> <hr/> <p>2(A) 9:12 2(A)(1) 9:18 20 28:23 2006 1:10 21st 28:23 22nd 28:23 24 21:16 28 2:7</p> <hr/> <p>3</p> <hr/> <p>3 2:4 30 34:9 33 53:14</p> <hr/> <p>4</p> <hr/> <p>48 21:17</p> <hr/> <p>5</p> <hr/> <p>5 6:16 50 31:5 53 2:10</p> <hr/> <p>6</p> <hr/> <p>6 6:16 67 53:15</p> <hr/> <p>7</p> <hr/> <p>72 21:17</p> <hr/> <p>8</p> <hr/> <p>8 1:10</p> <hr/> <p>9</p> <hr/> <p>9.99 36:22 938 25:1 95 42:24 43:6 51:7 52:17 99 6:23</p>				
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